IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-227

PHILIP MORRIS INC.,

Petitioner,

v.

SECRETARY OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

SALVADOR ANTONETTI ZEQUEIRA,
BASIL J. DAVILA,
GOLDMAN, ANTONETTI & DAVILA,
P. O. Box 13486,
Santurce, Puerto Rico 00908.

JAMES W. SHEA,
TIMOTHY C. QUINN, JR.,
CONBOY, HEWITT, O'BRIEN & BOARDMAN,
20 Exchange Place,
New York, New York 10005,

Counsel for Petitioner.

INDEX

CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-

PHILIP MORRIS INC.,

Petitioner,

v.

SECRETARY OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

The Petitioner, Philip Morris Incorporated (hereinafter "Philip Morris") prays that a writ of certiorari issue to review the opinion and judgment of the Supreme Court of the Commonwealth of Puerto Rico rendered in these proceedings on April 25, 1977.

OPINIONS BELOW

The opinion of the Supreme Court of Puerto Rico, as yet unreported, appears at Appendix pp. A-1 through A-4. The opinion of the Superior Court of Puerto Rico, San Juan Part, is unreported and appears at Appendix pp. A-5 through A-19.

JURISDICTION

The judgment of the Supreme Court of the Commonwealth of Puerto Rico was entered on April 25, 1977. A motion for reconsideration of that judgment was timely filed on May 9, 1977, was entertained by the court below and denied on May 19, 1977. A second motion for reconsideration was timely filed on May 25, 1977, entertained by the court below and denied on June 9, 1977. This petition for certiorari was filed less than 90 days from the date of final denial of the motions for reconsideration. The jurisdiction of this Court is invoked under 28 U.S.C. § 1258(3).

QUESTIONS PRESENTED

Petitioner sought reimbursement of excise taxes imposed by the Commonwealth of Puerto Rico on cigarettes which were stolen in New York City prior to shipment to and introduction into Puerto Rico. The stolen cigarettes were never recovered. The only evidence on record is that the cigarettes were sold on the black market in the New York City area. The Supreme Court of Puerto Rico reversed the lower court and held that petitioner was not entitled to reimbursement unless it could prove that it was impossible for the cigarettes to have reached Puerto Rico. The questions thereby arising are:

1. Whether the irrebutable presumption established by the Supreme Court of Puerto Rico in its opinion, to wit, that merchandise destined for Puerto Rico but which is stolen outside of Puerto Rico, over 1500 miles away across an ocean, was in fact introduced into Puerto Rico, violates petitioner's right to Due Process under the Fifth and Fourteenth Amendments.

2. Whether the application of an excise tax by the Commonwealth of Puerto Rico upon merchandise which never entered Puerto Rico is consistent with the Due Process Clause of the Fifth and Fourteenth Amendments.

3. Whether the application of an excise tax by the Commonwealth of Puerto Rico to a commodity which was never introduced into Puerto Rico is consistent with Section 3 of the Act of March 2, 1917 as amended 48 U.S.C. § 741(a) and Section 7653(a)(1) of the U.S. Internal Revenue Code of 1954, as amended 26 U.S.C. § 7653(a)(1), in the light of the Federal Supremacy Clause of the Constitution of the United States of America and the "compact" between the Congress of the United States and the people of Puerto Rico.

CONSTITUTIONAL PROVISIONS INVOLVED

1. Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of life liberty, or property, without due process of law . . ."

2. Constitution of the United States, Amendment XIV, § 1:

> ". . . nor shall any state deprive any person of life, liberty, or property, without due process of law. . ."

3. Constitution of the United States, Article VI Clause 2:

> "This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the Supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

STATUTORY PROVISIONS INVOLVED

1. Act of March 2, 1917, § 3, 48 U.S.C. § 741(a) left in full force and effect by Public Law 600, 81st Congress, approved July 3, 1950 "in the nature of a compact" with the people of Puerto Rico, 48 U.S.C. §§ 731(b), 731(e).

> "The internal revenue taxes levied by the legislature of Puerto Rico in pursuance of the authority granted by this chapter on articles, goods, wares or merchandise may be levied and collected as such legislature may direct, on the articles subject to said tax, as soon as the same are manufactured, sold, used or brought into the island . . ."

2. United States Internal Revenue Code of 1954 Section 7653(a)(1), 26 U.S.C. § 7653(a)(1):

> "A. Tax imposed.—
>
> 1. Puerto Rico.—All articles of merchandise of United States Manufacture coming into Puerto Rico shall be entered at the port of entry upon payment of a tax equal in rate and amount to the internal revenue tax imposed in Puerto Rico upon the like articles of Puerto Rican manufacture."

3. Excise Act of Puerto Rico, Act No. 2 of Jan. 20, 1956 Sections 10(a), 27 and 60(a)(1) to 60(a)(2), 13 L.P.R.A. §§ 4010(a), 4027 and 4060(a)(1) to 4060(a)(2)(a). The pertinent sections of this statute are set forth in the Appendix at pp. A-44 through A-47.

4. Regulations under the Excise Act of Puerto Rico 13 R.R.P.R. §§ 4010-1 to 4010-10, 4060-2(8). The portions of these regulations involved in this case are set forth in the Appendix at pp. A-47 through A-51.

STATEMENT OF THE CASE

The petitioner, Philip Morris, manufactures and packages cigarettes in Virginia and Kentucky, some of which are introduced into and sold in Puerto Rico. An excise tax is payable on cigarettes introduced into Puerto Rico. Certain internal revenue stamps issued by the Secretary of the Treasury of the Commonwealth of Puerto Rico, at the times relevant in this case, had to be affixed to each package of such cigarettes as evidence of payment of such tax. Therefore, petitioner in the normal course of business purchased the internal revenue stamps, and prior to the final packaging of the cigarettes, affixed those stamps to the packages of cigarettes destined for Puerto Rico.

The particular shipment of cigarettes involved in this case was stolen at a pier in Staten Island, New York, prior to shipment to Puerto Rico. New York police soon arrested several persons in the New York metropolitan area with some of the stolen cigarettes in their possession. A small percentage of the stolen cigarettes (2.269%) was recovered at the time of the arrests. The balance was never recovered. The only evidence on record indicates that the cigarettes were disposed of on the black market in the New York metropolitan area by members of organized crime.

Petitioner asked the Secretary of the Treasury of the Commonwealth of Puerto Rico to reissue new stamps to replace the stolen ones, or for reimbursement of the tax paid, on the grounds that the cigarettes had never entered Puerto Rico and that, therefore, the taxable event had never occurred. The Secretary of the Treasury of the Commonwealth of Puerto Rico, respondent herein, refused.

Petitioner filed an action in the Superior Court of Puerto Rico, San Juan Part, requesting reimbursement of the taxes paid or reissuance of the internal revenue stamps.

The Superior Court of Puerto Rico, based on a stipulation of facts and the only evidence on record (a deposition offered by Philip Morris), determined that the cigarettes had been stolen and disposed of by criminal elements in the New York Metropolitan area, except for a small percentage, later destroyed, recovered by the New York Police. Accordingly, the court held that the taxable event had not taken place and that respondent must reimburse petitioner for the tax paid. Appendix pp. A-12 through A-18.

The Secretary of the Treasury petitioned the Supreme Court of Puerto Rico for review and Philip Morris opposed. On the basis of the Secretary's petition for review and the opposition filed by Philip Morris the Supreme Court of Puerto Rico issued a decision on April 25, 1977 reversing the trial court as to all but 2.269% of the amount claimed. The Supreme Court of Puerto Rico held that in cases of theft of merchandise outside of Puerto Rico which would have been taxable had it been introduced into Puerto Rico, the taxpayer must prove the *impossibility* of the merchandise having entered into Puerto Rico. See Appendix p. A-3. In the context of the facts of this case, where the cigarettes were stolen in the New York area and the only evidence on record established that the cigarettes never left the New York area, the holding of the Supreme Court of Puerto Rico establishes an irrebuttable presumption which has no logical nexus to proven facts and is not a reasonable inference from those facts.

On May 9, 1977 Philip Morris timely moved the Supreme Court of Puerto Rico to reconsider its decision, arguing among other things, that the decision allowed the Secretary to give extraterritorial effect to the Excise Act of Puerto Rico in violation of 26 U.S.C. § 7653(a)(1) and 48 U.S.C. § 741(a). Appendix pp. A-20 through A-36. On May 19, 1977 the Supreme Court of Puerto Rico denied the motion for reconsideration without an opinion. Appendix p. A-37.

On May 25, 1977 a second motion for reconsideration was timely filed by Philip Morris, in which it presented arguments based on due process, expressly relying on due process clauses of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States of America. Appendix pp. A-38 through A-41. The second motion for reconsideration was denied, without opinion, on June 9, 1977. Appendix p. A-42. This petition followed.

HOW THE FEDERAL QUESTION WAS RAISED

Philip Morris did not challenge the constitutionality of the Excise Act in the trial court or raise due process arguments there because the precedents from the Supreme Court of Puerto Rico and the language of the statutes involved clearly indicated that upon proof by a preponderance of the evidence that the taxable event had not occurred, reimbursement would follow under the law of Puerto Rico. It was not until the decision of the Supreme Court of Puerto Rico was entered on April 25, 1977, that a new rule of law was established which clearly deprived petitioner of its property without due process, namely, that petitioner had to prove beyond all doubt that it was impossible for merchandise stolen outside of Puerto Rico (across an ocean, in fact) to have been later introduced into Puerto Rico.

Petitioner thereupon raised the federal questions before the Supreme Court of Puerto Rico by way of two motions for rehearing which were denied by that court without opinion. See, Statement of the Case, *supra*. Up to that moment, there had been no occasion to raise the federal questions, since the statute seemed straightforward and the only cases from the Supreme Court of Puerto Rico with any bearing on the issue were favorable to the position of Philip Morris. *The Texas Co. (P.R.) Inc.* v. *Tax Court*

82 P.R.R. 129, 130 (1961). *Ligget & Myers Tobacco Co.* v. *Buscaglia,* 64 P.R.R. 75 (1944) affirmed 149 F.2d 493 (1 Cir. 1945); *Pyramid Products, Inc.* v. *Buscaglia,* 64 P.R.R. 788, 795 (1945). The decision of the trial court in this case confirmed petitioner's expectations. Appendix p. A-18.

REASONS FOR GRANTING THE WRIT

1. The decision below directly conflicts with the due process principles enunciated in a long line of this court's decisions concerning irrebuttable presumptions.

This Court has repeatedly held that a statute which creates an irrebuttable presumption (whereby a person's rights are affected) not logically arising from the facts established deprives the affected person of rights without due process of law.

The following presumptions have been struck down as violative of due process under the Fifth or Fourteenth Amendment:

—that a teacher in her fifth or sixth month of pregnancy is physically unable to perform her duties. *Cleveland Board of Education* v. *La Fleur,* 414 U.S. 632 (1974);

—that a household which includes a person who has been claimed as a dependent by an individual in a previous year is not needy. *U.S. Dept. of Agriculture* v. *Murry,* 413 U.S. 508, (1973);

—that a student of a state college is permanently a non-resident if at the time of application for admission he resided out of the state. *Vlandis* v. *Kline,* 412 U.S. 441 (1973);

—that a father of illegitimate children, as opposed to a mother, is unfit to care for them. *Stanley* v. *Illinois,* 405 U.S. 645 (1972).

Rebuttable presumptions have been struck down in criminal cases for example:

—that unexplained possession of marihuana necessarily implies knowledge that the marihuana was illegally imported. *Leary* v. *United States,* 395 U.S. 6, (1969);

—that unexplained possession of cocaine necessarily implies knowledge that the cocaine was illegally imported. *Turner* v. *United States,* 396 U.S. 398, reh. den., 397 U.S. 958 (1970);

—that unexplained possession of firearm by a former convict implies knowledge that the firearm was illegally transported across state lines. *Tot* v. *United States,* 319 U.S. 463 (1943);

—that unexplained presence at the site of an unregistered still implies possession, custody and control of the still. *United States* v. *Romano,* 382 U.S. 136, (1965).[1]

See also *Carrington* v. *Rash,* 380 U.S. 89 (1965) and Note: "The Irrebuttable Presumption Doctrine in the Supreme Court", 87 *Harvard Law Review* 1534 (May, 1974).

The rationale of the cited cases, both dealing with irrebuttable presumptions in civil cases and with rebuttable presumptions in criminal cases is that a presumption will be allowed to stand only where there is a logical nexus between the presumed fact and the proven fact. The presumed fact must necessarilly follow from the fact proved.

In the case at bar, the decision of the Supreme Court of Puerto Rico establishes a presumption that merchandise

1. In *United States* v. *Gainey,* 380 U.S. 63, (1965) and *Barnes* v. *United States,* 412 U.S. 837, (1973), this Court found a logical nexus between the proven fact and the rebuttable presumption, as it did in the part of the case dealing with heroin in *Turner* v. *United States, supra.*

intended for Puerto Rico, but stolen before being introduced in Puerto Rico, did in fact enter Puerto Rico. The presumption is to all practical purposes irrebuttable, since even the evidence in this case—which consisted principally of a stipulation and which conclusively demonstrated that the stolen cigarettes never left the New York metropolitan area—was deemed insufficient to overcome it. To place upon a taxpayer the burden of proving that it was impossible for merchandise stolen in New York, over fifteen hundred miles and an ocean away from Puerto Rico, to have entered Puerto Rico, is to establish an irrebuttable presumption with no logical nexus between the presumed fact and the proven fact. Such an insurmountable burden deprives petitioner of its property without due process of law under either the Fifth or the Fourteenth Amendment to the Constitution of the United States of America.[2]

The trial court clearly perceived the issue when it stated:

> "It seems to us that to demand a greater degree of proof from plaintiff would be unreasonable and would detract from the justice of the case." Appendix p. A-18.

The conflict between the rule established by the decision of the Supreme Court of Puerto Rico and the principle repeatedly enunciated by this Court is so clear as to warrant granting certiorari in this case and summarily reversing the decision below.

---

2. This Court has held that the due process requirement applies to the Commonwealth of Puerto Rico, either under the Fifth Amendment or the Fourteenth Amendment, without deciding which amendment provides the protection. *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 668-669, n.5. (1974); *Examining Board* v. *Flores de Otero*, — — U.S. — —; 96 S.Ct. 2264 (1976).

2. The decision below gives extraterritorial effect to the tax laws of Puerto Rico in violation of due process principles set forth by this Court in numerous cases.

This Court has consistently held that the taxing power of a state cannot reach out-of-state transactions which are insufficiently related to activities within the taxing state, as violative of the due process clause, *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965); *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 (1951); *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327 (1944). These cases have established the doctrine that a prerequisite of state power to tax is that there be a "nexus" between the state and the transaction it seeks to tax, and that if such "nexus" does not exist, the state may not, consistent with due process, tax the transaction. Puerto Rico has no greater power in this respect than a state.

The decision below authorizes the imposition of a tax by the Commonwealth of Puerto Rico upon articles which never reached Puerto Rico. The required "nexus" never arose. The Commonwealth of Puerto Rico, in the case at bar, did not give petitioner anything for which it could ask return with respect to the particular shipment of cigarettes involved. The "transaction" which could have been validly taxed by Puerto Rico would have been the introduction of the cigarettes into Puerto Rico. The transportation of the cigarettes from Virginia and Kentucky to a New York pier is too remote, legally and geographically, for Puerto Rico's taxing power to reach.

The decision below is so clearly in conflict with long-standing constitutional principles enunciated by this Court as to merit issuance of a writ of certiorari and summary reversal of the decision below.

3. The decision below brings a statute of the Commonwealth of Puerto Rico in direct conflict with federal statutes in contravention of the Federal Supremacy Clause of the Constitution of the United States and the "compact" between the Congress of the United States and the people of Puerto Rico.

As a result of the decision below, the Excise Act of Puerto Rico, 13 L.P.R.A. §§ 4001 *et seq.*, was applied to articles stolen outside of Puerto Rico, prior to their introduction into Puerto Rico.

This application is clearly contrary to two federal statutes which authorize the legislature of Puerto Rico to levy and collect taxes on imports into Puerto Rico only when they are *brought into* the island. Section 3 of the Act of March 2, 1917, 48 U.S.C. § 741(a) and Section 7653(a)(1) of the Internal Revenue Code of 1954, 26 U.S.C. § 7653(a)(1). Although this Court did not have occasion to discuss the meaning of the phrase "brought into the island" in 48 U.S.C. § 741(a) in its opinion *West India Oil Co. (Puerto Rico)* v. *Domenech,* 311 U.S. 20 (1940), the only case where this Court has dealt with that section, that meaning is not ambiguous. The reach given to the Puerto Rican statute by the Supreme Court of Puerto Rico in the instant case cannot stand in the light of the Federal Supremacy Clause, Article VI, Clause 2, of the Constitution of the United States of America. Moreover, since Section 3 of the Organic Act of Puerto Rico, 48 U.S.C. §§ 741, 741(a) and 745, was continued in force and effect by Section 4 of Public Law 600 of the 81st Congress, approved July 3, 1950, as part of the "compact" with the people of Puerto Rico, 48 U.S.C. § 731(e), the decision of the Supreme Court of Puerto Rico also violates the "compact" between the Congress of the United States and the people of Puerto Rico.

This case thus presents an important question concerning conflict between statutes of the Commonwealth of Puerto Rico and federal statutes directly applicable to Puerto Rico.

4. The decision below, if allowed to stand, would encourage each State to attempt to tax any commodity destined for shipment to that State irrespective of whether the commodity was in fact ever introduced into the commerce of that State.

The several States as well as the possessions of the United States are in need of increasing tax revenues. The citizens of the several States and possessions depend upon interstate commerce to supply them with large amounts of non-local commodities. The decision below, if allowed to stand, would permit and encourage every local taxing power to attempt to tax merchandise destined for its territory but which, because of all-too-common mishaps such as accident, theft or hijacking, never reaches that destination. By imposing an insupportable burden of proof, as did the Supreme Court of Puerto Rico in this case, local authorities would attempt to accomplish what would otherwise be clearly outside their power: to give extraterritorial effect to their tax laws without giving anything in return to the taxpayer.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Supreme Court of Puerto Rico.

Respectively submitted,

SALVADOR ANTONETTI ZEQUEIRA,
BASIL J. DAVILA,
GOLDMAN, ANTONETTI & DAVILA,
P. O. Box 13486,
Santurce, Puerto Rico 00908.

JAMES W. SHEA,
TIMOTHY C. QUINN, JR.,
CONBOY, HEWITT, O'BRIEN & BOARDMAN,
20 Exchange Place
New York, New York 10005,

Counsel for Petitioner.

APPENDIX

IN THE
SUPREME COURT OF PUERTO RICO

No. R-76-338

PHILIP MORRIS, INC.,
Plaintiff-appellee,

v.

SECRETARY OF THE TREASURY OF PUERTO RICO,
Defendant-appellant.

Review

Judgment from the Superior Court, San Juan Part, Luis M. Villaronga, Honorary Judge

MR. CHIEF JUSTICE TRIAS MONGE delivered the opinion of the Court.

San Juan, Puerto Rico, April 25, 1977

In the middle of 1970, Philip Morris, Inc. cancelled in the United States $98,280 in internal revenue stamps of the government of Puerto Rico and affixed them to the cigarette packs which were to be shipped to our market. The Excise Act of Puerto Rico, Act No. 2 of January 20, 1956, as amended, 13 L.P.R.A. §§ 4010(a), 4060(2)(a), and 4063(b), then required the affixation and cancellation of such stamps at the moment of their introduction into Puerto Rico.[1]

Philip Morris sent the cigarettes to the New York docks, where they were stolen. The New York police was able to recover 2.269 percent of the shipment in said city, but that

1. Act No. 8 of October 17, 1975 established a new system for payment of these taxes, eliminating the use of the internal revenue stamps.

shipment was destroyed later when the cigarettes deteriorated at the Police warehouses. Nobody knows with certainty what happened to the rest of the shipment. The Superior Court concluded that the cigarettes were not introduced into Puerto Rico, and therefore the tax obligation did not arise. It held, further, that although there is no statutory provision providing for refund in cases of this nature, the same are governed by the doctrine which we established in *Liggett & Myers Tobacco Co., Inc.* v. *Buscaglia,* 64 P.R.R. 75 (1944), affirmed in 149 F.2d 493 (1st Cir. 1945). Consequently, the Superior Court determined that the Secretary of the Treasury should refund to Philip Morris the sum of $98,280 plus interest which the latter claims in its suit. The Secretary appealed before us from this judgment.

The specific problem which we are facing in this case—the propriety of refunding taxes in cases of theft—is completely new in this jurisdiction. To that effect we should consider, as a background, how it has been handled in the United States in view of the similarity with regard to that particular between our tax legislation and the United States tax legislation prior to 1954. The Federal Act was amended in that year to expressly prohibit the refund of taxes paid in cases of theft. 26 U.S.C. § 5705(a), c. 736, 68A Stat. 709. The refund is allowed only in cases of articles destroyed by fire, casualty, or act of God. As it appears from the legislative history of this statute, this amendment did not have the purpose of modifying the situation existing prior to 1954. The reports of the committees of the House of Representatives and of the Senate which considered the bill—H.R. No. 8300 (Union Calendar No. 498), 83d Cong., 2d Sess., 1954—show that the change which was being made, resulted from the desire to rieterate through a law of Congress what had already been decided by different courts. *House Report No. 1337 on the Internal*

Revenue Code of 1954, 83d Cong., 2d Sess. 98 and A-388 March 9, 1954, *Senate Report No. 1622,* 83d Cong., 2d Sess. 132, 553, June 18, 1954. This amendment was not introducing for the first time the provision to the effect that refund did not lie in cases of theft, while it lied in the other cases mentioned therein; it was only trying to clarify the legislative intent, in order to reinforce the long-standing rule of the courts. With regard to said rule, see: *United States* v. *American Tobacco Co.,* 166 U.S. 468 (1897); *Stephano Bro. to use of Great American Insurance Co.* v. *United States,* 89 F. Supp. 693 (Ct. of Claims, 1950); *Reynolds Tobacco Co.* v. *Robertson,* 22 F. Supp. 187 (D.C.M.N.C. 1937), aff. 94 F2d 167 (4th Cir., 1938), *cert. denied* 304 U.S. 563 and 589 (1938).

Consequently, it is impossible to resort to United States sources in order to confirm the judgment entered in this case. It remains to be seen whether our decision in *Liggett & Myers Tobacco Co., Inc.* v. *Buscaglia,* 64 P.R.R. 75 (1944), could fill the vacuum of the law and constitute authority to order the Secretary of the Treasury to refund the total amount of the taxes in this case. The answer is no. In *Liggett* the refund was ordered when the boat which brought the cigarettes with the affixed stamps to Puerto Rico was sunk. *Liggett* is only an echo of the doctrine established in the United States since the time of *United States* v. *American Tobacco Company.* There is no reason to extend *Liggett* beyond its facts to cases of theft as the one at bar. No case has been cited, nor have we found any case under the United States or the Puerto Rican legislation permitting refund of taxes for stolen articles which have not been destroyed. In cases of theft where the possibility of the nonoccurence of the taxable event cannot be eliminated, refund does not lie in the absence of an authorization. In the case at bar said possibility was eliminated only in regard to that part of the cigarettes destroyed by the New York police.

There being no legislative authorization or case law rule to the contrary, we consider that the Secretary of the Treasury of Puerto Rico lacks the power to refund the complete face value of the stolen stamps.

The writ is issued and the judgment is therefore modified to order only the refund to Phillip Morris, Inc., of a sum equivalent to 2.269 percent of the taxes paid in this case plus interest at the legal rate. Thus modified, the judgment is affirmed.

Chief Clerk's Certificate

I, Ernesto L. Chiesa, Chief Clerk of the Supreme Court of Puerto Rico, Do Hereby Certify:

That the foregoing is a true and faithful photostatic copy of the official translation from Spanish into English (said official translation having been made under the authority of Act No. 87 of May 31, 1972) of the opinion rendered by the Supreme Court of Puerto Rico on April 25, 1977, in the above-entitled case, (R-76-338) the original of which, in Spanish, is under my custody in this office.

In Witness Whereof and at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court, at San Juan, Puerto Rico, this 3d day of June 1977.

Ernesto L. Chiesa
Chief Clerk
Supreme Court of Puerto Rico

In The
SUPERIOR COURT OF PUERTO RICO
San Juan Section

Civil Number: 75:1200

Re: Reimbursement of Taxes

Philip Morris, Inc.,
Plaintiff,

vs.

Secretary of the Treasury of Puerto Rico,
Defendant.

Judgment

On February 25, 1975, 19 days after having been notified by the Secretary of the Treasury of his denial of its Request for Reimbursement, plaintiff, Philip Morris, Inc. filed a complaint requesting that this Court order the Secretary of the Treasury to reimburse the excise tax paid on certain cigarettes that plaintiff never introduced into Puerto Rico since they had allegedly been stolen before arriving at the Island. On the 25th of March, the defendant answered the Complaint admitting that he had denied plaintiff's request for reimbursement and denying other allegations of plaintiff. On June 16, 1975 this Court, at the request of plaintiff, ordered the taking of the deposition of a witness, David Hall, by oral examination in New York City.

On March 24, 1976 the parties submitted the case to the consideration of the Court by way of a stipulation of facts which they filed that day, the deposition of Detective David Hall taken in New York City on July 10, 1975 and filed with the Court on October 16, 1975 and memoranda filed by the parties. On April 1st, 1976, this Court accepted the stipulation of facts filed by the parties and the case was finally submitted to our consideration on June 3, 1976 with the filing of defendant's reply memorandum.

After an examination of the evidence offered, the stipulation of facts submitted by the parties, and considering their allegations and arguments, the Court makes the following:

FINDINGS OF FACT

1. The plaintiff, Philip Morris, Inc., is a corporation engaged in the manufacture of cigarettes in the United States and introduces and sells part of its production in the market of Puerto Rico.

2. The plaintiff sells several brands of cigarettes in Puerto Rico, including Marlboro, Parliament, Virginia Slims 100's, Philip Morris Multifilter and Benson & Hedges 100's, among others. Said cigarettes are manufactured in plants located in Richmond, Virginia and Louisville, Kentucky, and are packed in boxes of 10 and 20 cigarettes.

3. As a prerequisite to the introduction of cigarettes into Puerto Rico, Philip Morris Inc. must adhere to each pack of cigarettes an Internal Revenue Stamp issued by the Commonwealth of Puerto Rico for that purpose. These stamps are issued in sheets of 100 stamps each. For the year 1970, the stamps which were affixed to the 10-cigarette pack had a value of 13 cents per stamp and those affixed to the 20-cigarette packs had a value of 26 cents per stamp.

4. In order to use the Internal Revenue stamps Philip Morris Inc. must cut the stamps which come in the 100-stamp sheets and duly cancel each stamp, which is done before adhering them to the cigarette packs, by printing on them the words "Imported by Philip Morris of Puerto Rico, San Juan, Puerto Rico", as well as the date of the cancellation.

5. The plaintiff acquires the stamps by requesting them in writing to the office of the Department of the Treasury of the Commonwealth of Puerto Rico located in New York City. In the year 1970 that office was located at 132 Nassau Street of that City. Mr. Antulio Galvez was the Director of the above mentioned office and Mr. Angel Rivera had under his responsibility the Internal Revenue Stamps which were issued and sold to be affixed to the cigarette packages to be introduced into Puerto Rico.

6. By a letter of June 2, 1970 Philip Morris International placed with the office of the Department of the Treasury in New York an order of Internal Revenue stamps for a total of $325,000.00 for its division, Philip Morris of Puerto Rico, which order consisted of 1 million 26-cents stamps for a total of $260,000.00 and 500,000 13-cents stamps for a total of $65,000.00. On June 3, 1970 Philip Morris International also ordered an identical quantity of Internal Revenue Stamps, of the same denomination, also for a total value of $325,000.00.

7. The order of June 2, 1970 was issued by Mr. Angel Rivera on the 3rd of that month by way of sales order number 4, form AS-1502, by REA Express, shipping order 52-50-33. The order of June 3, 1970 was issued by Mr. Rivera on June 5, by sales order number 5, form AS-1502, by REA Express, shipping order 82-50-38. Both shipping orders were signed by Mr. Antulio Galvez as Director of the Office. The sales and deliveries were made to Philip

Morris Inc. and were paid the first by check number 7047, and the second by check number 7048, both checks having been received by the Nassau office on June 30, 1970.

8. The Internal Revenue stamps issued by the New York office of the Department of the Treasury were received by Philip Morris Inc. in Richmond, Virginia at the office of Mr. Henry Clay Hancock, who at that time was the "Export Coordinator" for Philip Morris Inc. with offices at Seventh and Stockton Streets, Richmond, Virginia, having received the first shipment of June 4, 1970 and the second shipment on June 8, 1970.

9. For the purpose of maintaining an adequate control and accounting of the Internal Revenue Stamps which Philip Morris uses to export cigarettes to Puerto Rico, Mr. Hancock's office keeps all Internal Revenue Stamps under key and they are delivered from that office to the production supervisors in such quantities as will be used each day. Mr. Hancock's office receives a numbered order by teletype from New York for the production which is required in each case. On June 6, 1970 Mr. Hancock received order number 28 for the production of 5,940,000 cigarettes to be packed in 20-cigarette packages and 1,620,000 cigarettes to be packed in 10-cigarette packs. Of that amount 144,000 cigarettes for 20-cigarettes packs were to be manufactured in the Louisville, Kentucky plant and the rest in Richmond, Virginia. The production specified in the above mentioned order required the use of $77,220.00 in Internal Revenue Stamps of the 26 cent denomination and $21,060.00 in Internal Revenue stamps of the 13 cent denomination for a grand total of $98,280.00.

10. The corresponding orders for the production of eight (8) brands of cigarettes to comply with order number 28 were issued from Mr. Hancock's office. The order

included, among others, Benson & Hedges, Philip Morris, Virginia Slims, Parliament, and Marlboro, of different kinds.

11. The Internal Revenue Stamps required for the shipment were duly cancelled and cut. The words "Imported by Philip Morris de Puerto Rico, San Juan, Puerto Rico", 7/70 was printed on each one and they were delivered to the Supervisor on the same day when each order of cigarettes was to be manufactured. The stamps were automatically adhered by machines to the packages produced, as specified in the order.

12. The cigarettes produced by the Philip Morris Inc. plants in Richmond, Virginia and in Louisville, Kentucky are sent to New York by truck and from there they are shipped to Puerto Rico. The shipment manufactured pursuant to order 28 was sent to New York on July 6, 1970, by way of Davisdon Transfer & Storage Co., in van number RTTZ-790157 belonging to Trans American Trailer Transport (TTT), which van had been duly sealed with seal number R63780. The van contained a total of 630 cases or gross of cigarettes which contained all the production required by order 28, including the production of the Richmond, Virginia plant and the Louisville, Kentucky plant.

13. On July 8, 1970, at about 4 o'clock in the morning, the New York Police received a call informing of the theft of a van from Pier number 13 of the City of New York, in Staten Island. That van was the same van belonging to Trans American Trailer Transport (TTT) in which there had been shipped from Richmond, Virginia, the 630 gross of cigarettes of various brands belonging to Philip Morris Inc. and to which had been affixed $98,280.00 in Internal Revenue Stamps. Two days after the theft at the docks and after the New York Police had begun to investigate,

a person was arrested in that City who had in his possession 13 cartons of cigarettes with the Internal Revenue Stamps of the Commonwealth of Puerto Rico affixed, which cigarettes were identified as belonging to the shipment stolen from pier 13. That same day the New York Police arrested another person for possession of stolen property and 162 cartons of those cigarettes stolen from pier 13 were confiscated from that person. On the following day, that is on July 11, 1970, the New York Police arrested another person and confiscated, after a search, 82 cartons of cigarettes with Puerto Rico Internal Revenue Stamps of those stolen at pier 13.

14. On July 19, 1970 the New York Police recovered in Queens the van which had been stolen from pier 13 and where Philip Morris Inc. had shipped the cigarettes destined for Puerto Rico. The van was found abandoned and it had been painted white, covering over the identification numbers. The van was empty.

15. On July 28, 1970 the New York Police was informed of the recovery of 11 cases or gross containing 1,320 cartons of Philip Morris cigarettes, all with Internal Revenue Stamps of Puerto Rico which had formed part of the shipment stolen from pier 13. As a result of this finding, the Police, after keeping under surveillance an individual known as a trafficker in contraband cigarettes, proceeded to arrest him on September 1, for criminal possession of 139 cartons of cigarettes. Among those cartons of cigarettes the Police found a quantity which were also from those stolen in the highjacking at pier 13.

16. The New York Police also received information about sales in the New York area of cigarettes which had adhered to them Internal Revenue Stamps of the Commonwealth of Puerto Rico. The investigations carried out discovered that in the Staten Island area, cigarettes appeared in vending machines, and it was verified that they were part of the shipment stolen at pier 13.

The New York Police established that the cigarettes which appeared in Staten Island were being sold in machines located in an entertainment company belonging to an organized crime figure associated to the Gambino family. The illegal traffic in cigarettes in the New York area is very lucrative and organized crime participates actively in it. From the persons arrested the New York Police obtained information that the wholesalers in the illegal traffic were offering the Marlboro cigarettes stolen from the pier at a special price, since they derived 100% profit because the cigarettes were stolen.

18. Philip Morris Inc. never recovered the cigarettes stolen from pier 13. The cigarettes recovered by the New York Police during the different arrests were stored for a considerable length of time at the Office of the "Police Department Property Clerk" of the New York Police Department which, since they had deteriorated, were not recovered by Philip Morris Inc. and after a period of approximately 90 days, were destroyed by the persons in charge of property of the New York Police Department. The destruction of that property was normally carried out by burning it in furnaces, although they were also often destroyed and dumped into the ocean once destroyed.

19. Philip Morris Inc. never recovered the stolen cigarettes nor the Internal Revenue Stamps valued at $98,280.00 which were adhered to the packs in the shipment.

20. One thousand seven hundred and sixteen (1716) cartons of cigarettes with the corresponding Internal Revenue Stamps were recovered by the Police and destroyed in the City of New York and were never introduced into Puerto Rico.

21. As regards the rest of the shipment which was stolen from the docks of the City of New York, the police of that city did not receive any information that the cigarettes were found or seen in any other State, not even the State of New Jersey which is closer to Staten Island than is New York City itself, despite the fact that the cigarettes were easily identifiable because of the Internal Revenue Stamps affixed to them. Neither did the Federal Bureau of Investigation report that it was able to find cigarettes in any other place in the United States.

22. The cigarettes belonging to plaintiff which were stolen were lost in New York City, did not leave the metropolitan area of that city and did not arrive at nor were they introduced into Puerto Rico.

Considering the foregoing findings of fact, the Court reaches the following:

Conclusions of Law

1. Article 10(a) of the Excise Act of Puerto Rico, Act Number 2 of January 20, 1956, as amended (13 L.P.R.A. Section 4010(a)), which governs the case before us, provides that the tax established by that statute shall only apply if the Article has been introduced into or sold, consumed, used, transferred, or acquired in Puerto Rico, and that said tax shall be paid only once at the time and in the manner specified in the statute. It is clear that if none of the taxable events or impositive facts described in this Section occur no tax obligation arises under the statute. The tax on cigarettes imposed by this statute was established as the price to be paid, only once, for the privilage of introducing, selling, consuming, using, transfering or acquirng the article in Puerto Rico. The date of its introduction is the day of the tax, the date when the tax obligation becomes due and in which the authority to collect the tax arises. Its

introduction establishes the *nexus* between the articles introduced and our tax jurisdiction for those purposes. *Texas Co. (P.R.), Inc.* vs. *Tax Court,* 82 P.R.R. 129 (1961); *Liggett & Myers Tobacco Co. Inc.* vs. *Buscaglia,* 64 P.R.P. 65 (1944) affirmed 149 F. 2nd. 493 (1 Cir. 1945). See also Article 3 of the Puerto Rican Federal Relations Act Volume 1, L.P.R.A., pages 194-195, 48 U.S.C. Section 741a.

2. The Plaintiff in this case would be obliged to pay a tax on the cigarettes in question only if it were shown that those cigarettes were introduced into Puerto Rico. For those purposes "introduction" is defined by law as the arrival at the piers, airports, or other terminals in Puerto Rico of Articles consigned to the Island which are actually unloaded at the piers, airports, or other terminals. Article Four (4) of the above mentioned Act Number 2 (13 L.P.R.A. 4004(4)).

3. The preponderance of the evidence presented has persuaded us that the cigarettes in question did not arrive at and were not introduced into Puerto Rico and, therefore, we conclude that the plaintiff is entitled reimbursement of the $98,280.00 it paid as a tax on those cigarettes.

4. Our conclusion is not changed by the fact that pursuant to Article 63 of Act Number 2 (13 L.P.R.A. 4063) the Secretary had established, by Regulation Number 5 of 1967 concerning cigarettes, 14 R & R.P.R. Secs. 4010-1 to 4010-12, that taxes on cigarettes introduced into Puerto Rico shall be paid by adhering and canceling special Internal Revenue Stamps for cigarettes in the boxes in which they were packed. Contrary to what defendant proposes in this case, it is the introduction of the article and not the sale of the Internal Revenue Stamp which gives rise to the tax obligation.

The sale of the stamps in New York is done with the purpose of facilitating compliance with the Law permitting the manufacturer to adhere the stamps during the packaging process. Those stamps are bought to prove or give evidence of payment of the taxes which Puerto Rico has authority to impose. When, as in this case, the stamps are bought, are adhered and are canceled before the articles are introduced into Puerto Rico, or before any of the taxable events provided for in the statute occur that purchase constitutes, in effect, an advance payment of the taxes.

If after this advance payment, but before the articles become subject to the tax, the articles or the stamps are lost, and therefore the purpose for which the stamps were purchased is frustrated, that is, the purpose of giving evidence of payment of a tax legally due, reimbursement of the tax paid in advance must be made. *Ligget & Myers Tobacco Co. Inc.* vs. *Buscaglia* supra.

5. The decision in the case of *Ligget & Myers Co. Inc.* vs *Tobacco Co. Inc.* previously cited, applies to this case. In that case the cigarettes and the stamps were lost when the ship in which they were being transported to Puerto Rico was sunk. When it ordered the reissuance of the stamps to the taxpayer, our Supreme Court, at page 85, resolved that "the essential thing was to demonstrate the loss or mutilation of the stamps before the article had become subject to the tax, and that circumstance was proved by the evidence that . . . had not been in any way controverted by the appellee." The difference between that case and this one is limited to the form in which the loss occurred: sinking of a ship in that case vs. theft of the cigarettes and the stamps in this one. In both cases, however, the loss of the cigarettes and the stamps before the article had become subject to the tax was proved by the

evidence presented by the taxpayer involved in each case, without said evidence having been in any way controverted by the defendant.

6. We have carefully analyzed the Excise Act which imposes the tax here in question and we have not found any provision which governs this case. Therefore, we conclude that the same principles applied in the case of *Ligget & Myers Tobacco Co.*, previously cited, must apply in this one.

Defendant argues that Article 27(d) (13L.P.R.A. 4027 (d)* which provides for the reissuance of stamps in certain circumstances in the case of cigarettes is dipositive of this case and since the plaintiff has not satisfied the requirements of that Article it does not have a right to reimbursement. Defendant is not correct. By its own terms, Article 27(d) applies only when the cigarettes have already been introduced into Puerto Rico and after they have been "withdrawn from the factories, or from piers, airports or other terminals" and later are withdrawn from the market as being unsuitable for normal consumption. Therefore, it provides relief for taxpayers who have already become obligated to pay the tax, but are forced to withdraw their product from the market. There is nothing in the statute, however, which provides for the manner of reissuance of stamps to those persons who, like plaintiff in this case, have paid the tax in advance, but who never have become obligated to pay because they have not even introduced the article into Puerto Rico. There is nothing in the law moreover to prohibit the reimbursement of taxes to this persons.

---

* Act Number 8 of October 17, amended Article 27(d) to eliminate all reference to Internal Revenue Stamps, since that form of evidence of payment of the tax is no longer used. There is nothing in the 1975 amendment to affect our decision. See also Act Number 5 of October 6, 1959 (13 L.P.R.A. Section 263).

7. Our conclusion that plaintiff should be reimbursed for the taxes it paid in advance is not altered by the argument of defendant that the evidence presented by plaintiff is insufficient to prove a loss of the stamps and that they were not introduced into Puerto Rico. The burden is on the taxpayer, of course, to persuade the trier of fact, although no special *quantum* of proof is required. The evidence should be of the same degree and measure of persuasion required in all other civil cases. *Krueger* vs. *Secretary of the Treasury,* 89 P.R.R. 338 (1963); *Collazo* vs. *Secretary of the Treasury,* 82 P.R.R. 629 (1961); *Carrión* vs. *Treasurer,* 79 P.R.R. 350 (1956).

As a general rule the law does not require a degree of proof that produces absolute certainty, since such proof is rarely possible. The case does not have to be proved with mathematical exactitude by direct evidence, nor in a conclusive fashion, nor in such a way as to produce such a prefect degree of conviction that it does not admit the possibility of evidence to the contrary. The litigant can prove his case with indirect evidence, by inferences as well as presumptions. *Murcelo* vs. *H. I. Hettinger & Co.,* 92 P.R.R. 398 (1965); *Rodríguez* vs. *Ponce Cement Corp.,* 98 P.R.R. 196 (1969). Only moral certainty is required or a degree of proof which produces conviction in an unbiased observer. The party with the burden of proof must induce the judge to believe that the existence of the facts he affirms is more probable that their non-existence. Hence our problem consists of determining by a preponderance of admissible and believable evidence in a form not clearly erroneous, what is the tax obligation of the plaintiff. *Carrión* vs. *Treasurer,* supra at page 362.

In the light of these principles we conclude that the plaintiff satisfactorily proved its case as it was obligated to do.

8. The stipulation filed by the parties conclusively demonstrates that the plaintiff purchased the stamps from the Secretary of the Treasury's agent in New York, that it adhered and cancelled the stamps on the cigarette packs, that these were stolen from a pier in New York City, that 2 days after the theft the police began to recover part of the shipment from sellers in that City, that part of the shipment was recovered from a known trafficker in clandestine cigarettes and that the police established that cigarette packs from that shipment were sold in vending machines owned by a figure belonging to organized crime associated to the Gambino family. The stipulation also established that the plaintiff never recovered the cigarettes or the stamps and that the cigarettes recovered by the police were burned or destroyed by it as is normally done with evidence no longer needed.

These stipulated facts have persuaded us that as plaintiff alleges, the cigarettes and stamps were lost in New York. Its evidence is believable and reasonable and the defendant has not produced any proof that diminishes the preponderance of this evidence.

9. Having stipulated the above, the defendant nevertheless alleges that it was not directly proved that the cigarettes and the stamps did not arrive at Puerto Rico. We have not been convinced by the argument of defendant. The stipulated facts demonstrate that the cigarettes were sold by members of criminal organizations in New York. Moreover, we have been convinced by the deposition of Detective David Hall. The fact that the cigarettes were on sale at the retail level on the streets on or before two days after the theft, their sale in vending machines, the manner in which the stolen van was camouflaged with the apparent purpose of storing the cigarettes while they were being distributed and the opinion of a person with the experience of Mr. Hall, allows us to conclude reasonably

that the cigarettes did not leave New York. This conclusion is buttressed by the fact that the police agencies did not find cigarettes from the shipment in any other State, nor even in other areas of New York State. The defendant has produced no evidence which tends to demonstrate the contrary.

It seems to us that to demnad a greater degree of proof from plaintiff would be unreasonable and would detract from the justice of the case.

10. The plaintiff has alleged and proved that it actually bore the burden of payment of the tax, that such payment was not due and that therefore it should be reimbursed as a matter of law.

For the reasons given above, the Court enters judgment approving the complaint filed by plaintiff Philip Morris Inc. and ordering the Secretary of the Treasury to reimburse to plaintiff the sum of $98,280.00 claimed in the complaint plus interests pursuant to the provisions of Article 86 of Act Number 2 of January 20, 1956, as amended.

Register and notify.

San Juan, Puerto Rico, this 25th day of August, 1976.

(SGD.) LUIS M. VILLARONGA
Honorary Superior Magistrate

SEAL OF THE COURT

I CERTIFY:

BELEN BONIT, Clerk
By María M. Santiago
Deputy Clerk

Chief Clerk's Certificate

I, Ernesto L. Chiesa, Chief Clerk of the Supreme Court of Puerto Rico, Do HEREBY CERTIFY:

That the foregoing is a true and faithful photostatic copy of the translation from Spanish into English of the judgment entered by the Superior Court of Puerto Rico, San Juan Part, on August 25, 1976, in civil case No. 75-1200, *Philip Morris, Inc.* v. *Secretary of the Treasury of Puerto Rico.*

IN WITNESS WHEREOF and at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court, at San Juan, Puerto Rico, this 3d day of June 1977.

ERNESTO L. CHIESA
Chief Clerk
Supreme Court of Puerto Rico

IN THE
SUPREME COURT OF PUERTO RICO

R-76-338

REVIEW

PHILIP MORRIS, INC.,
Plaintiff-Appellee,

vs.

SECRETARY OF THE TREASURY OF PUERTO RICO,
Defendant-Appellant.

Motion for Reconsideration

BASILIO DAVILA
GOLDMAN, ANTONETTI & DAVILA
Post Office Box 13486
Sarturce, Puerto Rico 00908
Phone: 725-6800
Attorneys for Appellee

ROBERTO ARMSTRONG, JR.
Acting Solicitor General

REINA COLON DE RODRIGUEZ
Assistant Solicitor General
Department of Justice
Post Office Bonx 192
San Juan, Puerto Rico 00902
Phone: 724-1991
Attorneys for Appellant

San Juan, Puerto Rico
May 9, 1977

SUBJECT MATTER INDEX

Legal Index

IN THE
SUPREME COURT OF PUERTO RICO

R-76-338

REVIEW

PHILIP MORRIS, INC.,
Plaintiff-Appellee,

vs.

SECRETARY OF THE TREASURY OF PUERTO RICO,
Defendant-Appellant.

Motion for Reconsideration

To the Honorable Court:

Comes now plaintiff-appellee through the undersigned attorneys and respectfully prays the reconsideration of the opinion issued by this Honorable Court on April 25, 1977, on the following grounds:

We will show in the following discussion that the conclusions of this Honorable Court in its opinion should be reconsidered because (1) the federal tax legislation prior to 1954 allowed the refund of excise taxes paid in cases of theft and (2) there is case law in the United States which allows the refund of excise taxes for stolen merchandise which has not been destroyed.

We will also show that the rule established by this Honorable Court in its opinion constitutes a unique rule contrary to the provisions of the Code of Civil Procedure, of prior

opinions of this Honorable Court and, moreover, it violates the rule established for more than a hundred and twenty five years by federal courts in this field, reason why the judgment allows the imposition and collection of excise taxes to plaintiff in violation of several federal and commonwealth statutes.

In its opinion of April 25, 1977 this Honorable Court concludes (at pages 2 and 3 of the opinion) that it is impossible to resort to United States sources in order to affirm the judgment rendered by the trial court. We respectfully hold that such is not the case. Federal legislation prior to 1954 allowed the refund of excise taxes paid on tobacco products in cases of theft. Contrary to what this Honorable Court stated in its opinion, the reports of the Committees of the House of Representatives and of the Senate of the United States(1) do not show that the change made in 1954 was due to a desire to reiterate by statute what had already been decided by the courts.

The Committee reports in question state that . . . "Several Court decisions have interpreted *'withdrawal from the market'* to include loss by casualty (other than theft) while the particular articles are still in the possession of the manufacturer. This change will bring the law specifically in line with these Court decisions" (underscore supplied).

Now then, what the above mentioned Committees state in their reports is that at that time there were court opinions which had construed the phrase "withdrawal from the market" as not including cases of theft. What the Committee reports referred to is that refund has been allowed in cases of theft under the specific provisions of Section 2198 of the Internal Revenue Code of 1939 (53 Stat. 216), which is the only section regarding refunds which includes the phrase "withdrawal from the market."

(1) *House Report#1337*, 83 Cong. 2d Session, March 9, 1954, page 98 and *Senate Report #1622*, 83 Cong. 2d Session, June 18, 1954, page 132, both referring to H.R. 8300 (Union Calendar 498) 83 Cong. 2d Session 1954.

The controversy which had arisen with regard to that specific section was whether the term "withdrawal from the market", as used in that section, extended to cases where the "withdrawal" was due to causes beyond the control of the manufacturer or, on the contrary, whether it was only applicable to cases where the manufacturer or importer withdrew the products volntarily.(2)

Hence, it is clear that the Committees of the House and of the Senate were not stating that in all cases of theft of tobacco products, refunds of stamps or its value is not allowed. As a matter of fact and of law, they could not state so for the simple reason that, with the possible exception contemplated by said Section 2198, the Internal Revenue Code of 1939 and the Rules established thereunder did contemplate the refund of excise taxes paid on tobacco products in cases of theft.

---

(2) *Stephano Bros. to use of Great American Insurance Co.* v. *United States*, 89 F. Supp. 693. With regard to this particular case, we call the attention of this Honorable Court to the fact that despite the statements of the Committees of the House and of the Senate of the United States mentioned above, we have not been able to find any case which says that the credit or refund for articles withdrawn from the market, contemplated by Section 2198 of the Internal Revenue Code of 1939, is not applicable to cases of theft. In fact, the opinion of the Court in *Stephano Bros.* leaves the door open to the possibility that a refund be considered in cases of theft when it decides that the withdrawal contemplated by Section 2198 does not have to be a voluntary withdrawal but it may be an involuntary withdrawal as in cases of force majeure (page 695 of the Opinion). With regard to the other two cases cited by this Honorable Court in its opinion (at page 3), to wit, *United States* v. *American Tobacco Co.*, 166 U.S. 468 (1897) and *Reynolds Tobacco* v. *Robertson*, 94 Fed. 167 (1938) they do not state whether or not excise taxes should be refunded in cases of theft. In *American Tobacco, supra*, the event which causes the claim for refund is a fire. In *Reynolds, supra*, the taxpayer bases its right to refund on an exemption for exports; that exemption is not available when it is shown that the products were not exported from the United States due to theft. In *Reynolds*, however, the court was not faced with the right to refund on the basis that theft of the merchandise constituted a "withdrawal from the market" under Section 2198, for which reason the opinion of the Court does not mention the problem under consideration.

As an example, we point out that Rule 140.104 promulgated under Sections 3300 to 3313 of the Internal Revenue Code of 1939, regarding manufacturers and distributors of tobacco products, provided as follows:

> "140.104: Loss by fire, theft, etc. (a) Loss of tobacco material, manufactured products, or stamps, in a tobacco or cigar factory, occurring through fire, flood, storm, theft or other causes over which the manufacturer has no control, must be reported by the manufacturer at once to the collector of the district in which the factory is located. The manufacturer should also ascertain immediately the quantities of tobacco material and manufactured product of each kind, and number of stamps of each denomination and class, which on account of the casualty, cannot be used, sold or will not serve the purpose for which originally intended and for which he would be entitled to credit in his account . . .
>
> (b) In case of loss of tobacco by a dealer in leaf tobacco from the causes named in (a), so much of the instructions therein as are applicable shall be complied with.
>
> (c) . . ." (underscore supplied).

Having established that federal legislation prior to 1954 did contemplate the refund of excise taxes paid on tobacco products in cases of theft, we deem proper to point out that the simple fact that Section 2198 of the Internal Revenue Code of 1939 *allowed or did not allow* the refund of excise taxes in cases of theft, is not a determinant factor as to the controversy before the Honorable Court in the present case.

The reason is that the refund provided by Section 2198 of the Federal Internal Revenue Code of 1939 in cases of withdrawal of products from the market, is a refund of excise taxes whose legality is not in question. That is, it

provides for the instance where *admittedly* the taxable event has occurred, the tax is paid and the articles are stolen after payment.[3]

II. Purpose of Federal Legislation

The case before this Honorable Court is totally different. In this case, it has not been admitted that the taxable event, the importation or introduction, has occurred. The issue in this case is precisely the improper imposition of the tax in cases of theft.

We respectfully hold that the Federal legislation considered by this Honorable Court in its opinion is irrelevant to this controversy, since said legislation presumes the legality of the imposition of the tax, reason why it offers no guideline on the decision of the trial court; namely, that if theft is proved to have occurred prior to the taxable event, the taxable event does not occur, hence it is proper to refund any taxes improperly collected.

On this matter, Federal legislation regarding Manufacturer's Excise Taxes[4] provides by administrative ruling that a manufacturer or importer of articles subject to excise taxes who has his articles stolen before such articles are subject to the imposition of the tax, does not have to pay any tax on such articles. Revenue Ruling 67-58, 1967-1C.B.306 provides in its pertinent part as follows:

> "Gasoline was stolen from a producer (importer) who still held legal title thereto. Held, the producer (importer) incurred no liability under section 4081 of the Internal Revenue Code of 1954 for tax because the theft constituted neither a sale nor use of the gasoline by him within the meaning of the applicable sections of the Code. *This principle applies equally as well to manufacturers, producers, or importers in the case of the other manufacturers excise taxes imposed by chapter 32 of the Code.*" (Underscore supplied)

(3) The amendments of 1954 on this particular only confirm the argument in all cases involving tobacco products. In other words, under the 1954 Code, there is no refund of taxes paid on tobacco products in cases of theft, *but this refers only to cases where the original imposition of the tax is not in question.* See 26 U.S.C.A. 5705 (a) (1954). *There is nothing in the federal statutes considered by this Honorable Court which approves the imposition of excise taxes where the theft occurs prior to the taxable event.*

(4) Sections 4061 *et seq.* of the Internal Revenue Code of 1954, August 16, 1954, 68 A Stat.

It should be noted that the above-cited Administrative Ruling refers to a situation of facts almost identical to the one in the case at bar. The Administrative Ruling provides that since a theft is not considered in the same way as a sale or use by the manufacturer or importer, the excise tax is not applicable. It should be emphasized that the ruling does not require any proof that the merchandise was destroyed or that it was not used or sold within the territorial limits, despite the fact that the merchandise would surely be used and/or sold within those territorial limits.

We will now consider a number of cases decided by several Federal Courts under the provisions of the Federal Tariff Act of 1930.[5] Pursuant to the provisions of that Act, including prior and subsequent legislation, certain merchandise, articles and/or products are subject to payment of federal customs duties if they are imported into the United States from abroad.

Just as under Article 10 of the Puerto Rico Excise Act, the imposition of the tax arises with the importation or introduction into the country in question. There is no obligation to pay if there is no introduction into the United States.

A reading of the cases decided under this Federal legislation, some of which are cited below, shows that where articles destined to enter into the United States are stolen

5. 46 Stat. 739, June 17, 1930, 19 U.S.C.A. 1202 *et seq.*

and/or disappeared (1) in circumstances where it is not possible to prove whether they were stolen or if they disappeared prior to entry; (2) where there is no proof that the articles did *not* enter into the United States; (3) where there is no evidence that they were destroyed and (4) where, at times, the possibility that the articles had entered is admitted, the federal courts, following the rule established by the Supreme Court of the United States in *Marriot* v. *Brune et al.*, 50 U.S. 619, 13 L.Ed. 282 (1850), more than a hundred and twenty five years ago, consistently hold that the importer is *not* subject to payment of customs duties, since they deem that the importer is subject to such payment only *if there is positive evidence that the products actually entered into the United States.* The leading case in this area is *Marriot* v. *Brune et al., supra.* As the Supreme Court stated at pages 633 and 634:

> "*. . . By express provision in all our Revenue laws, duties are imposed only on imports from foreign countries;* or the importation from them, or what is imported. . . . As to imports, they therefore can cover nothing which is not actually brought into our limits. That is the whole amount which is entered with the Customs House; that is all which goes into the consumption of the country; that, and that alone, is what comes in competition with our domestic manufacturers; *and we are unable to see any principle of public policy which requires the words or the Acts of Congress to be extended so as to embrace more.* . . . Consequently, where a portion of the shipment in cases like this does not arrive here and hence does not come under the possession and cognizance of the corresponding House officers, it cannot, as heretofore shown, be taxed on any ground of law and propriety, and does not therefore require for its exemption any positive amendment by Congress. *Such is the case of a portion being lost* by perils of the sea, or by being thrown over-board to save the ship; or by fire, or piracy, *or larceny* or

> barratry; or a sale and delivery of the voyage by natural decay. *If there be a material loss it can make no difference to the sufferer or to the government whether it happened by natural or artificial causes.* . . ." (underscore supplied).

In *Harry N. Bloomfield Co.* v. *United States,* 442 F.2d 1401 (1971), in a case where one hundred and thirty three bales of wool were consigned to the importer but only one hundred and thirty two bales were delivered to the importer by the customs agent, without the whereabouts of the remaining bale having been established, and where the position of the government was that the importer was bound to pay customs duties on one hundred and thirty three bales of wool, the United States Customs Court of Appeals, following the decision of the United States Supreme Court in *Marriot* v. *Brune, supra,* stated:

> "*Of course, the report that the bale in question was not found at the time of release of the importation is not conclusive proof that it was not actually imported or landed; but in the absence of any evidence to the contrary,* the logical and most likely inference in the circumstances of this case is that the bale was not found because it was not landed." At page 1404 (underscore supplied).

We wish to call the attention of this Honorable Court that in the cited case the court admits the possibility that the merchandise had entered into the territorial limits of the United States. But in view of the fact that there was no positive evidence that the merchandise actually entered into the United States, it concludes that since the merchandise was not found, the most logical inference is that it never entered into the United States. No evidence was required or presented with regard to the possible destruction of the merchandise, although the rest of the shipment entered into the United States.

In *United States* v. *Lippman, Spier & Hahn,* 11 C.T. of C.A. 336 (1922) the court stated at page 340:

> "The express opinion of the appraiser that the case was robbed is not important. If it were, it might just as well relate to *robbery before the package crossed the customs line as afterwards.*"

It should be noted that the court infers that if the theft had occurred prior to the importation, there would be no imposition and payment of the customs duty in question. It was held that the merchandise was not subject to the payment of tax. No evidence was required or presented with regard to the possible destruction of the merchandise, despite the fact that the box where the merchandise was packed entered into the United States.

In *F. W. Woolworth Co.* v. *United States,* 22 Cust. Ct. 197, C.D. 1176 (1949), the court refused to impose the tax, holding that since the box had been under the custody of the customs agents until its delivery to the importer, it had been conclusively established that the merchandise had not been stolen after the importation. The court is actually saying that since the articles were stolen prior to the taxable event the tax may not be imposed.

In *International Food Trading Co.* v. *United States,* 33 Cust. Ct. 342, 5833 (1954), certain imported boxes were never recovered. On the basis of this evidence the Court refused to impose customs duties on the importer since it deemed that there had been no proof that the boxes had been imported. No evidence was required or presented regarding the possible destruction of the merchandise, notwithstanding that apparently all the boxes entered into the United States.

In *Abraham & Straus, Inc.* v. *United States,* 26 Cust. Ct. 87 C.D. 1305 (1951), a box full of taxable merchandise was imported. When the box was opened to inspect its contents it was found that the contents had disappeared. The Court indicated that in such circumstances it is presumed that the contents had disappeared prior to entry into the United States and not afterwards. No evidence was required or presented regarding the whereabouts of the merchandise or its possible destruction, despite the fact that the box had entered into the United States.

The abovecited cases regarding federal legislation on the imposition of customs duties in cases of importation into the United States, and the imposition of taxes in cases of sales or consumption within the United States, clearly show that there are federal administrative rulings and case law allowing the refund of taxes on merchandise which has been stolen and not destroyed.

The opinion of this Honorable Court and its judgment constitute the only instance we have confronted where a court has taken a position different to the one set forth in the abovecited cases; actually requiring positive proof that the merchandise has not entered into the territorial limits and/or that said merchandise has been destroyed.

III. Code of Civil Procedure

In so doing, this Court not only departs from the rule established by the United States Supreme Court in *Marriot* v. *Brune et al., supra,* but also from the provisions of Article 1 of Law #235 of May 10, 1949, (13 L.P.R.A. 281), and of Article 5 of Law #328 of May 13, 1949 (13 L.P.R.A. 288) insofar as these articles provide that in cases regarding the Excise Act of Puerto Rico the introduction and admission of evidence will be guided exclusively by the applicable provisions of the Code of Civil Procedure.

In requiring that "the possibility" of the nonoccurrence of the taxable event be eliminated, this Court is requiring what the Law of Evidence does not require: A degree of evidence which, excluding the possibility of error, produces absolute certainty. Since "such a degree of proof is rarely possible" and in the law "only moral certainty is required, or that degree of proof which produces conviction in an unprejudiced mind,"[6] to require plaintiff-appellee to eliminate the possibility of the nonoccurrence of the taxable event as to the stolen cigarettes is to require a quantum of evidence different from and greater than that required by law.

In *Carrion* v. *Treasurer of Puerto Rico,* 79 P.R.R. 350, 362 (1956) this Honorable Court indicated that "nor is there anything requiring a special *quantum* of evidence, or a particular force or quality therein." Now then, as in all tax litigations the proceedings are subject to the applicable provisions of the Code of Civil Procedure, and since the doctrine established in *Carrion, supra,* has not changed,[7] the judgment rendered in this case actually establishes a new test as to the degree of proof required to prove a fact; a degree which is greater than that required in *Treasurer* v. *Tax Court and Aguirre,* 70 P.R.R. 384 (1949) which was discarded in *Carrion, supra.*

IV. VIOLATION OF SEVERAL LAWS

To require plaintiff-appellee a greater quantum of proof than that required by law, demanding that it prove the possibility of the nonoccurrence of the taxable event, has the effect of giving extraterritorial applicability to the Puerto Rico Excise Act in violation of Section 3 of the

6. Article 366, 32 L.P.R.A. § 1624.

7. See *Collazo* v. *Secretary of the Treasury,* 82 P.R.R. 629 (1961); *Reyes Garcia* v. *Secretary of Treasury,* 84 P.R.R. 574 (1962).

Puerto Rican Federal Relations Act and Section 7653 of the Internal Revenue Code of the United States of 1954.

The obvious result is that the importer will be paying a tax to Puerto Rico for articles not introduced into Puerto Rico. The taxable event then is no longer the importation as required by Section 7653 of the Internal Revenue Code of 1954[8] and the Puerto Rican Federal Relations Act, both of which provide insofar as pertinent that as soon as the articles are imported into the island the legislative assembly is empowered to levy the tax.

In order to prove that the unrecovered cigarettes were not imported (introduced) into Puerto Rico, plaintiff-appellee offered, as we have indicated, the testimony of detective David Hall. He specifically testified, on page 44, lines 6 to 14, of his deposition that "There was no indication in the course of the investigation that the cigarettes left the metropolitan area." Furthermore, no information was received that the cigarettes were introduced into areas outside of New York or into other states (page 46, lines 12 and following).

With this evidence, which was uncontroverted by the Secretary of the Treasury, the trial court made logical and reasonable inferences which led it to conclude that the taxable event had not occurred. These inferences have been discarded by this Honorable Court in requiring proof which *Carrion, supra,* does not require and which the Law of Evidence itself does not demand.

8. 26 U.S.C.A. 7653(a). This section establishes that articles manufactured in the United States will be subject to the payment of a tax equal to that paid by similar products manufactured in Puerto Rico but only when the products enter into Puerto Rico. In *Compania Ron Carioca Destileria, Inc.* v. *U.S.,* 2 AFTR 2d 6267 (1946), referring to identical language contained in the predecessor to the companion section to 7653, 26 U.S.C.A. 7652, (Federal Internal Revenue Code of 1939, secs. 3360 and 3361), the court stated at page 6268: "The United States Revenue Laws apply *only when* the goods actually enter the United States . . . There was no duty to pay the United States tax on beverage spirits until they reached the United States . . . (underscore supplied).

The theft of the merchandise prior to its importation by plaintiff-appellee having been established, and since there is uncontroverted proof that said merchandise was stolen in and never left the City of New York, and since there is absolutely no evidence locating any part of the merchandise within the jurisdiction of Puerto Rico, the opinion of this Honorable Court is contrary to all the cases decided by Federal Courts in similar situations and violates the abovestated provisions of the Code of Civil Procedure, for which reason the judgment rendered by this Court has the effect of giving extraterritorial applicability to the Excise Act of Puerto Rico in violation of the Puerto Rican Federal Relations Act, the Federal Internal Revenue Code of 1954 and the Excise Act of Puerto Rico itself.

PRAYER

FOR THE FOREGOING REASONS, it is respectfully requested that this Honorable Court reconsider its opinion and judgment in this case and that consequently it order the refund to plaintiff-appellee of the taxes in question.

I CERTIFY that on this day I have mailed a true and faithful copy of this Motion for Reconsideration to attorney Reina Colon de Rodriguez, Post Office Box 192, Old San Juan, Puerto Rico 00902.

Respectfully submitted.
San Juan, Puerto Rico, this 9th day of May 1977.

GOLDMAN, ANTONETTI & DAVILA
Attorneys for plaintiff-appellee
Box 13486—Santurce, P.R. 00908

By .....
BASILIO DAVILA

IN THE
SUPREME COURT OF PUERTO RICO

R-76-338

REVIEW

PHILIP MORRIS, INC.,
Plaintiff-Appellee,
v.
SECRETARY OF THE TREASURY OF PUERTO RICO,
Defendant-Appellant.

Resolution

San Juan, Puerto Rico, May 19, 1977

The Motion for Reconsideration filed by the plaintiff-appellee on May 9th is hereby denied.

It was so agreed by the court and certified by the Chief Clerk. Mr. Justice Rigau took no part in this decision. Mr. Justice Martin abstained.

(Sgd.) ERNESTO L. CHIESA
Chief Clerk

IN THE

SUPREME COURT OF PUERTO RICO

R-76-338

REVIEW

PHILIP MORRIS, INC.,
Plaintiff-Appellee,

vs.

SECRETARY OF THE TREASURY OF PUERTO RICO,
Defendant-Appellant.

Second Motion for Reconsideration

BASILIO DAVILA
GOLDMAN, ANTONETTI & DAVILA
Post Office Box 13486
Santurce, Puerto Rico 00908
Phone: 725-6800
Attorneys for Appellee

ROBERTO ARMSTRONG, JR.
Acting Solicitor General

REINA COLON DE RODRIGUEZ
Assistant Solicitor General
Department of Justice
Post Office Box 192
San Juan, Puerto Rico 00902
Phone: 724-1991
Attorneys for Appellant

San Juan, Puerto Rico
May 25, 1977

IN THE

SUPREME COURT OF PUERTO RICO

R-76-338

REVIEW

PHILIP MORRIS, INC.,
Plaintiff-Appellee,

vs.

SECRETARY OF THE TREASURY OF PUERTO RICO,
Defendant-Appellant.

Second Motion for Reconsideration

To the Honorable Court:

Comes now appellee, Philip Morris, Inc. through the undersigned attorneys and respectfully requests that this Honorable Court reconsider its decision of April 25, 1977, set aside the same and issue another affirming the judgment of the Superior Court of Puerto Rico, San Juan Part, on the following grounds:

1. This Honorable Court issued a resolution denying the Motion for Reconsideration filed by appellee. Said resolution was sent to the parties on May 20, 1977 as it appears from the postmark, copy of which is attached. The term to file any subsequent motion for reconsideration expires on May 25, 1977 due to the fact that May 21 and 22 were not working days. Rule 45(c) of the Rules of this Honorable Court.

2. The purpose of this second motion for reconsideration is to bring to the consideration of this Honorable Court two additional arguments or grounds, to wit:

(a) In establishing that a taxpayer, in cases of theft, must prove the possibility of the nonoccurrence of the taxable event, this Honorable Court has modified the Law of Evidence of Puerto Rico and has established a rule of evidence which impairs the substantive rights of the parties in violation of the provisions of Article V, Section 6, of the Constitution of the Commonwealth of Puerto Rico and without following the procedure established in that section.

(b) In establishing that a taxpayer, in case of theft, must prove the possibility of the nonoccurrence of the taxable event, this Honorable Court has established an irrebuttable presumption which deprives plaintiff of its property without due process of law in violation of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States of America. In its previous motion for reconsideration, or more precisely, in its petition for a hearing for oral argument and to file a supplemental memorandum, plaintiff stated that it was reserving the right to claim before the pertinent federal forum the rights guaranteed by the Constitution of the United States of America, pursuant to the doctrine of *England* v. *Louisiana Medical Examiners* 375 U.S. 411 (1964). Since the case law construing the corresponding provision of the Constitution of the Commonwealth of Puerto Rico, Section VII of Article 2, is not abundant, plaintiff-appellee now wishes to raise the same argument before this Honorable Court, but based on the Constitution of the United States of America and the corresponding case law. The most relevant case law was cited in the petition for a hearing for oral argument and to file supplemental memorandum filed on May 13, 1977, at page 3.

Plaintiff-appellee wishes to claim all its rights before this Honorable Court, including those arising and derived from the Constitution of the United States of America. Plaintiff-appellee claimed such rights before the trial court and the complete record of this case contains all the necessary evidence to evaluate such arguments. The argument regarding the violation of constitutional rights created by an irrebuttable presumption was not originally raised since such presumption was originally established by this Honorable Court.

WHEREFORE it is respectfully requested that this Honorable Court affirm the judgment of the Superior Court of Puerto Rico, San Juan Part.

Respectfully submitted.

In San Juan, Puerto Rico, this 25 day of May, 1977.

GOLDMAN, ANTONETTI & DAVILA
Attorneys for plaintiff-appellee
Post Office Box 13486
San Juan, Puerto Rico 00908

(Signed) BJD
Basil J. Davila

I CERTIFY: That on this same date I have sent by regular mail a copy of this Second Motion for Reconsideration to Reina Colon de Rodriguez, Esq., Post Office Box 192, Old San Juan, Puerto Rico, 00902.

/s/ BASIL J. DAVILA
Basil J. Davila

IN THE

SUPREME COURT OF PUERTO RICO

R-76-338

REVIEW

PHILIP MORRIS, INC.,
Plaintiff-Appellee,

v.

SECRETARY OF THE TREASURY OF PUERTO RICO,
Defendant-Appellant.

Special Division composed of MR. CHIEF JUSTICE TRIAS MONGE, MR. JUSTICE MARTIN, and MR. JUSTICE NEGRON GARCIA.

Resolution

San Juan, Puerto Rico, June 9, 1977

The foregoing motion for reconsideration is hereby denied.

It was so agreed by the court and certified by the Chief Clerk.

(Sgd.) ERNESTO L. CHIESA
Chief Clerk

Chief Clerk's Certificate

I, Ernesto L. Chiesa, Chief Clerk of the Supreme Court of Puerto Rico, DO HEREBY CERTIFY:

That the foregoing is a true and faithful translation from Spanish into English (said official translation having been made under the authority of Act No. 87 of May 31, 1972) of the following documents which are part of the record in case R-76-338, *Philip Morris, Inc.* v. *Secretary of the Treasury of Puerto Rico,* the originals of which, in Spanish, are under my custody in this office:

1. Motion for Reconsideration of May 9, 1977.
2. Petition for a hearing for oral argument and to file supplemental memorandum to motion for reconsideration of May 13, 1977.
3. Resolution of May 19, 1977.
4. Second Motion for Reconsideration of May 25, 1977.
5. Resolution of June 9, 1977.

IN WITNESS WHEREOF, and at the request of the interested party, and upon payment of the corresponding fees, I have hereunto set my hand and affixed the seal of this Court at San Juan, Puerto Rico, this 22d day of July 1977.

ERNESTO L. CHIESA
Chief Clerk
Supreme Court of Puerto Rico

By: VERNIS DE LA ROSA
Deputy Clerk

Excise Act of Puerto Rico
13 LPRA § 4001 et seq.

• • •

§ 4010. Taxes on articles

(a) Imposition of Tax. A tax shall be levied, collected and paid on articles listed in the table in subsection (b) below, at the rates prescribed and in accordance with the designated sections. The tax shall apply if the article has been introduced into or sold, consumed, used, transferred, or acquired in Puerto Rico, and shall be paid only once, at the time and in the manner specified in Chapter 354, Part B of this subtitle. Application of this tax shall be subject to the exemptions enumerated in Chapter 353, Part D.

• • •

§ 4027. Cigarettes

(a) Articles Taxed. The tax on cigarettes, at the rates prescribed in section 4010 of this title, shall apply to cigarettes except as provided in subsection (c) below.

(b) Determination of Wholesale Market Price. The "wholesale market price in Puerto Rico" means the highest of the prices charged to, or collected from, the retailer, directly or indirectly, by the introducer or manufacturer (as the case may be), distributor or wholesaler.

(c) Sales not Taxed. The tax on cigarettes shall not apply to sales or transfers made of this article:

(1) To the Army, Navy or Air Forces of the United States of America and to the Veterans Administration.

(2) To tourist ships of foreign registry or registry of the United States of America devoted exclusively to the transportation of passengers. In these cases delivery of cigarettes in violation of the rules or procedures established by the Secretary shall entail the obligation on the introducer to pay the tax. The introducer shall furnish a bond to answer for the tax.

(d) Reissuance of Stamps in Certain Circumstances. Cigarettes which, after having withdrawn from the factories, or from piers, airports or other terminals, are taken away from the market as being unsuitable for normal consumption, may be destroyed under the supervision of the Secretary, who shall be authorized to reissue new stamps to the introducer or manufacturer who originally paid the taxes, provided he claims same within a year from the date of payment.

Amended in 1975, to read:

(d) Tax Refund in Specific Circumstances. Cigarettes which, after having been withdrawn from the factories, or from piers, airports or other terminals, are taken away from the market as being unsuitable for normal consumption, may be destroyed under the supervision of the Secretary, who shall be authorized to refund or accredit the tax to the person who paid it to the treasury.

(e) Identification Requirements. Cigarettes manufactured, introduced, sold, conveyed, used or consumed in Puerto Rico, shall have affixed upon the boxes, packages or packs in which packed a label with the information or characteristics the Secretary of the Treasury may determine by regulation. Each cigarette box, package or pack must have the word "taxable" or "tributable" stamped on

a visible place, as well as on each one of the cigarettes. These provisions shall not be applicable to exempt cigarettes.—Amended Oct. 17, 1975, No. 8, p. 760, § 1, eff. 60 days after Oct. 17, 1975.

• • •

§ 4060. Articles taxable under section 4010

In the case of articles subject to tax under section 4010 of this title, the liability for the tax and the time for payment of the tax shall be in accordance with the following rules:

(a) Direct Introduction. In the case of articles introduced into Puerto Rico in any manner:

(1) Taxpayer.—The taxpayer shall be, except as provided in subsection (c) below:

(a) if the article is consigned directly to a consignee—the consignee;

(b) if the article is shipped to the order of shipper or to an intermediary, or if the consignee is indefine—the person claiming the article. If the article is not taken possession of within 30 days from the date of introduction, the taxpayer shall be the sender;

(c) if the article is introduced by a person arriving in Puerto Rico—the traveller or crew member introducing the article.

(2) Time of Payment. The tax shall be paid:

(a) in the case of an article introduced other than by mail or personal arrival—before the taxpayer takes possession of the article. When the articles to be introduced are cigarettes manufactured in the United States, the tax on which is

required to be paid through the affixing and cancelling of internal revenue stamps, the Secretary is authorized to grant to the introducer, in those cases where said stamps are affixed and cancelled by the manufacturer, an extension of time not exceeding thirty (30) days from the date of delivery of the stamps, within which to pay the amount thereof. Failure to pay the internal revenue stamps within the term prescribed shall be sufficient cause for the Secretary of the Treasury to suspend this form of payment by the introducer.

13 Rules and Regulations of Puerto Rico

§ 4010-1. Scope of regulation

(a) This division defines the terms "cigarettes" and "wholesale market price" and regulates the packaging of cigarettes, the sealing of cigarette packs and containers and the packaging of packs and containers of cigarettes.

(b) The portions enclosed in quotation marks are provisions of the Excise Act of Puerto Rico (13 LPRA § 4001 et seq.) transcribed here.

The Regulation set out in this division is approved by virtue of the authority conferred on the Secretary of the Treasury under sec. 78 of the Excise Act of Puerto Rico (13 LPRA § 4078).

§ 4010-2. Definitions

The terms listed below shall, for the purposes of this division, be defined as follows:

(1) "Cigarettes" means any roll of natural or synthetic tobacco, or of any cut vegetable matter, whether natural or synthetic, or any mixture of these; or any other cut solid

material or substance used in the manufacture of cigarettes, except when the covering of said roll consists of a layer of natural tobacco leaves.

(2) "Law" means Act No. 2, approved January 20, 1956, and known as the Excise Act of Puerto Rico, as amended (13 LPRA § 4001 et seq.).

(3) "Person" includes an individual, a syndicate, a trust, an estate, a partnership, a company, a corporation or any association of any kind whatsoever.

(4) "Exempt person" means any person who, by virtue of his exempt condition, as defined by the Law, is authorized to acquire taxable articles without paying tax on them.

(5) "Wholesale market price" means the highest of the prices charged or paid by the introducer or manufacturer, in the first sale carried out in Puerto Rico.

(6) "Secretary" shall mean the Secretary of the Treasury.

§ 4010-3. Base for tax payments

The payment of taxes on cigarettes shall be based upon the "wholesale market price", as defined in subdiv. (5) of sec. 4010-2 of this title.

§ 4010-4 How taxes shall be paid

The taxes on cigarettes manufactured, introduced, sold, transferred, used or consumed in Puerto Rico shall be paid by affixing internal revenue stamps especially designed for cigarettes on the boxes, containers, or packs containing cigarettes. These stamps shall be of a denomination corresponding to the quantity of cigarettes in said boxes, containers, or packs and shall be duly cancelled upon being affixed.

§ 4010-5. Duty of manufacturer and introducer to obtain revenue stamps, to affix them to boxes, containers or packs of cigarettes and to cancel said stamp.

As soon as cigarettes, in any quantity whatsoever, are manufactured in or introduced into Puerto Rico, the manufacturer or importer shall obtain internal revenue stamps of the proper denominations and affix said stamps upon the boxes, containers or packs of cigarettes. Such cigarettes shall not be taken from the factory or from the custody of Customs, shipping company, express company, post office, airport, transportation company, or terminal of any kind, before having first fulfilled these requirements. The manufacturer or importer shall not sell, transfer, or use such cigarettes without having first affixed to them the appropriate internal revenue stamps and canceled said stamps as prescribed in this division.

§ 4010-6. How internal revenue stamps shall be cancelled

The internal revenue stamps affixed on the boxes, containers or packs of cigarettes shall be cancelled by stamping on their surface the name and address of the manufacturer or importer and the cancellation date.

§ 4010-7. How cigarettes shall be packaged in Puerto Rico

Cigarettes for consumption in Puerto Rico shall be packaged in containers or packs of 2, 4, 5, 10, 15, 16, 20, 50 or 100 cigarettes each and in no other quantities. Cigarettes shall not exceed 4 inches in length, or be of the usual length common to cigarettes.

§ 4010-8. Sales outside Puerto Rico to be tax free

Each and every local manufacturer selling cigarettes outside of Puerto Rico may do so without being subject to

these taxes by keeping on file, duly organized by date, for a period of not less than 4 years from the export date, the following documents:

(1) Commercial invoice of sale;

(2) Bill of Lading;

(3) Shipper's export declaration; and

(4) Landing certificate from the country of destination.

§ 4010-9. Word "taxable" to be printed on cigarettes

(a) Cigarettes manufactured in or introduced into Puerto Rico shall have printed on each individual cigarette the word "TAXABLE" or its Spanish equivalent, "TRIBUTABLE".

(b) The word "TAXABLE" or the word "TRIBUTABLE" shall be printed on the border of any and every box, container or pack of cigarettes. Should the case be cylindrical, it should nonetheless have the word "TAXABLE" or the word "TRIBUTABLE" printed somewhere upon its surface.

(c) In the case of cigarette brands to be introduced for the first time in Puerto Rico, the requirement that the word "TAXABLE" or the word "TRIBUTABLE" be printed on each cigarette or container shall be waived in the case of the first and second shipments, by means of a request to that end, addressed to the Secretary and approved by him. The request should be filed by the importer 15 days before removing such cigarettes from the dock or other terminal.

§ 4010-10. Effectiveness

This division shall take effect 30 days after being filed with the Department of State of the Commonwealth of Puerto Rico, in conformity with the provisions of the Regulations Law of 1958, as amended (3 LPRA § 1041 et seq.).

• • •

13 R.R.P.R. § 4060-2(8)

(8) "Introduction" shall mean the arrival at the piers, airports or other terminals in Puerto Rico of:

(A) articles consigned to the Island which are actually unloaded at the piers, airports or other terminals;

(B) articles brought to said terminals by the passengers or crews of ships or airplanes.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-227

PHILLIP MORRIS, INC., *Petitioner*

v.

SECRETARY OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO, *Respondent*

On Petition for Writ of Certiorari to the Supreme Court of the Commonwealth of Puerto Rico

---

RESPONDENT'S BRIEF IN OPPOSITION

HECTOR A. COLON CRUZ
Solicitor General

ROBERTO ARMSTRONG, JR.
Deputy Solicitor General

REINA COLON DE RODRIGUEZ
Assistant Solicitor General
P. O. Box 192
San Juan, Puerto Rico 00902
Phone: 724-1991

PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-227

PHILLIP MORRIS, INC., *Petitioner*

v.

SECRETARY OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO, *Respondent*

On Peition for Writ of Certiorari to the Supreme Court of the Commonwealth of Puerto Rico

---

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE COURT:

Now comes Respondent through its undersigned attorneys and respectfully prays that the Writ of Certiorari requested by Petitioner to review the opinion and judgment of the Supreme Court of the Commonwealth of Puerto Rico rendered in these proceedings on April 25, 1977, be denied.

OPINION BELOW AND PROCEDURAL BACKGROUND

The reference made to the Opinion of the Supreme Court of the Commonwealth of Puerto Rico on this case and to the facts as to the procedural background before the Commonwealth of Puerto Rico Courts, as stated by the Petitioner in its Petition for Writ of Certiorari, are correct and in order to avoid repetition we adopt them herein.

STATEMENT OF THE CASE

The petitioner, Phillip Morris, manufactures and packages cigarettes in Virginia and Kentucky. It also introduces and sells cigarettes of its's production in Puerto Rico under the name of "Phillip Morris de Puerto Rico". An excise tax is payable on cigarettes destined to Puerto Rico. The internal revenue stamps issued by the Secretary of the Treasury of the Commonwealth of Puerto Rico, at the times relevant in this case, were affixed to each package of such cigarettes as evidence of payment of such tax. Therefore, petitioner in the normal course of business purchased the internal revenue stamps in the office that the Treasury Department of the Commonwealth of Puerto Rico had at that time in the City of New York and affixed those stamps to the packages of cigarettes destined for Puerto Rico and delivered the shipment to the carrier.

The particular shipment of cigarettes involved in this case was stolen at a pier in Staten Island, New York, while pending shipment to Puerto Rico. New York police soon arrested some persons in the New York metropolitan area with some of the stolen cigarettes in their possession. A small percentage of the stolen cigarettes (2.269%) was recovered at the time of the arrests. The balance was never recovered neither

in New York City nor in any city of the United States. (Respondent Appendix, pp. 6 through 9).

No information was furnished to the Treasury Department of the Commonwealth of Puerto Rico or to its officials in New York City of the theft of the cigarettes and stamps. It was not until almost a year had elapsed from the date of the occurrence of the theft that the Secretary of the Treasury of Puerto Rico was informed of the theft. This was when Petitioner asked for the reissuance of new stamps or reimbursement of the taxes paid.[1] The Secretary of the Treasury of the Commonwealth of Puerto Rico refused to reissue new stamps or to reimburse the tax paid.

Petitioner filed an action in the Superior Court of Puerto Rico, San Juan, Part, requesting reimbursement of the taxes paid or reissuance of the internal revenue stamps. The Superior Court of Puerto Rico, based on a written stipulation of facts and a deposition offered by Petitioner, even though no evidence was presented on the issue, determined that the cigarettes had been stolen and disposed of by criminal elements in the New York Metropolitan area, (except for a small percentage, later destroyed, recovered by the New York Police). Based on that finding it held that the taxable event had not taken place and that respondent must reimburse petitioner for the tax paid, plus interest. (Petitioner Appendix pp. A-12 through A-18).

The Secretary of the Treasury petitioned the Supreme Court of Puerto Rico for Review. Respondent Appendix, pp. 1 through 17. Phillip Morris opposed.

---

[1] The theft occurred on July 8, 1970 and the petition for reissuance of the internal revenue stamps or the reimbursement of their face vaule was made on May 4, 1971.

After an examination of the same evidence considered by the Superior Court, the Supreme Court of Puerto Rico issued a decision on April 25, 1977 reversing the trial court as to all but 2.269% of the amount claimed. The Supreme Court of Puerto Rico held as follows:

> "... In cases of theft where the possibility of the nonoccurrence of the taxable event cannot be eliminated, refund does not lie in the absence of an authorization. In the case at bar said possibility was eliminated only in regard to that part of the cigarettes destroyed by the New York police.
>
> There being no legislative authorization or case law rule to the contrary, we consider that the Secretary of the Treasury of Puerto Rico lacks the power to refund the complete face value of the stolen stamps." See Petitioner Appendix, pp. A-3 through A-4.

On May 9, 1977 Phillip Morris moved the Supreme Court of Puerto Rico to reconsider its decision, arguing for the first time that the decision allowed the Secretary of the Treasury to give extraterritorial effect to the Excise Act of Puerto Rico in violation of 26 U.S.C. § 7653 (a) (1) and 48 U.S.C. § 741 (a). Petitioner Appendix pp. A-20 through A-36. On May 19, 1977 the Supreme Court of Puerto Rico denied the motion for reconsideration. Petitioner Appendix p. A-37. On May 25, 1977 a second motion for reconsideration was filed by Petitioner, in which, likewise for the first time, it presented arguments based on due process, expressly relying on due process clauses of the Fifth Amendment and the Fourteenth Amendment to the Constitution of the United States of America. Petitioner Appendix pp. A-38 through A-41. The second motion for reconsideration was denied on June 9, 1977. Petitioner Appendix p. A-42. This petition followed.

JURISDICTION

The jurisdiction of this Court was invoked under 28 U.S.C., Sec. 1258 (3).

Said statute states that:

> "Final judgment or decrees rendered by the Supreme Court of the Commonwealth of Puerto Rico may be reviewed by the Supreme Court as follows:
>
> (1) .....
>
> (2) .....
>
> (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of the Commonwealth of Puerto Rico is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution, treaties, or statutes of, or commission held or authority exercised under, the United States."

The present form was given to said statute in 1961 in order to eliminate the right to appeal from the Supreme Court of the Commonwealth of Puerto Rico to the Court of Appeals for the First Circuit and to provide that final judgments and decrees entered by the Supreme Court of Puerto Rico shall be reviewed instead by the Supreme Court of the United States.

The Judicial Conference and the Department of Justice supported the passage of this legislation, recognizing that in cases involving a non-Federal question, the Court of Appeals for the First Circuit would not reverse the Supreme Court of Puerto Rico unless

the decision is "inescapably wrong" or "patently erroneous". 1961 *U.S. Code Congressional and Administrative News*, page 2449.

It has been held repeatedly that the Supreme Court of Puerto Rico should not be reversed in a matter of local law unless the court's determination is "inescapably wrong" or "patently erroneous". ***Sancho Bonet*** v. *Texas Co.*, 308 U.S. 463 (1940); ***De Castro*** v. ***Board of Commissioners***, 322 U.S. 451 (1944); ***C. Brewer P. R.*** v. ***Corchado***, 303 F. 2d 654 (1962); ***Acosta-Marrero*** v. ***Commonwealth of Puerto Rico***, 275 F. 2d 294 (1960); ***Fullana Corp.*** v. ***P. R. Planning Board***, 257 F. 2d 355 (1958); ***Marquez*** v. ***Avilés***, 252 F. 2d 715 (1958); ***Iglesias Acosta*** v. ***Secretary of Finance of Puerto Rico.***, 220 F. 2d 651 (1955); ***Sagastivelza*** v. ***P. R. Ins.***, 171 F. 2d 563 (1949); ***Compose*** v. ***Central Cambalache, Inc.***, 157 F. 2d 43 (1946).

This Court stated in ***Fornaris*** v. ***Ridge Tool Co.***, 400 U.S. 41 (1970) that:

> "The relations of the federal courts to Puerto Rico have raised delicate problems. It is a Spanish-speaking Commonwealth with a set of laws still impregnated with the Spanish tradition. Federal Courts, were inclined to construe Puerto Rican Laws in the Anglo-saxon tradition which often left little room for the overtones of Spanish culture. Out of that experience grew a pronouncement by this court that a Puerto Rican court should not be overruled on its construction of local law unless it could be said to be 'inescapably wrong'. See ***Bonet*** v. ***Texas, Co.***, 308 U.S. 463, 471." (See also ***Diaz González*** v. ***Colón González***, 536 F. 2d 453 (1976).

In order to properly invoke the jurisdiction of this Court, petitioners must present a substantial federal

question, not merely a frivolous or colorable one.[2] "It is not enough that a federal question be lurking in the record". ***Ramos*** v. ***Leahy***, 11 F. 2d 955 (1940). In the case at bar, notwithstanding petitioner's allegations, the only question before this Court is whether the Secretary of the Treasury of the Commonwealth of Puerto Rico, without legislative authorization to do so, can reimburse the face value of internal revenue stamps affixed to packages of cigarettes as evidence of payment of such tax, when those packages were allegedly stolen but where notice of the theft is made ten months thereafter, and there is no evidence of their destruction so that it could be established they could not be introduced, sold and used in Puerto Rico. Because the affixed stamps are the sole evidence of the payment of the tax such cigarettes would normally enter into Puerto Rico undetected. (For an explanation of the real character of the internal revenue stamps affixed to the stolen cigarettes, see Respondent Appendix pp. 5 through 6. We respectfully submit on the basis of the whole record of the case, that this clearly fails to constitute the federal question upon which this Court would have jurisdiction pursuant to 28 U.S.C. 1258 (3).

As it can be appreciated, no substantial federal question is involved in this case. But even assuming, arguendo, that the questions alleged were considered as federal questions, these were not timely raised below, since these were raised after the decision of the Supreme Court of the Commonwealth of Puerto Rico was entered. In other words these were presented before the

[2] See: ***Prensa Insular de P. R.*** v. ***People of P. R.***, 189 F. 2d 1019 (1951); ***Mercado*** v. ***Lluberas Pasarell***, 225 F. 2d 715, cert. den. 350 U. S. 936.

Supreme Court of Puerto Rico by way of two motions for reconsideration. Petitioner tries to justify its delay in raising those questions by arguing that up to that moment there had been no occasion to raise them because the statute and cases were favorable to its position. For the contrary, we consider that Petitioner had to raise those questions at the Superior Court of Puerto Rico for the following reasons: When the Secretary of the Treasury of Puerto Rico denied petitioner's request for reissuance of new stamps to replace the stolen ones, or reimbursement of the taxes paid, then and there originated the only controversy in this case. When Petitioner filed its action in the Superior Court of Puerto Rico was the appropriate moment to raise the questions lately presented because the effects of the decision of the Secretary of the Treasury denying its request are the same effects of the decision of the Supreme Court of Puerto Rico; with the only difference that the Secretary of the Treasury totally denied the reimbursement of the taxes paid or the reissuance of new stamps, and the Supreme Court denied only the reimbursement of the stamps affixed to the cigarettes that were not found and destroyed in New York City or any other city of the United States. As it can be appreciated, the most appropriate moment to raise the questions lately presented, was at the moment of the filing of the action in the Superior Court of Puerto Rico by Petitioner.

As this Honorable Court has held, when a constitutional question is not timely raised in state court proceeding, that question is not open in proceeding on petition for certiorari. *Ellis* v. *Dixon*, (1955) 349 U.S. 458, 99 L. ed. 1231, rehearing denied 350 U.S. 855, 100 L. ed. 759. *Flournoy* v. *Wiener*, 321 U.S. 253, 88 L. ed.

708 (1944). See also *Corretjer* v. *People of Puerto Rico*, 194 F. 2d 527 (1952); *Prensa Insular de Puerto Rico* v. *People of Puerto Rico*, 189 F. 2d 1019 (1951).

For the aforementioned reasons we respectfully submit that the certiorari here requested should be denied for lack of jurisdiction.

Nonetheless, the argumentation that follows will show that the decision of the Supreme Court of the Commonwealth of Puerto Rico on this case was not "inescapably wrong" or "patently erroneous", but correct.

REASONS FOR DENYING THE WRIT

The Decision of the Supreme Court of Puerto Rico Does Not Conflict With Any of This Court's Decisions

Petitioner argues that the decision of the Supreme Court of Puerto Rico is in conflict with this Court's decisions in *Cleveland Board of Education* v. *La Fleur*, 414 U.S. 632 (1974); *U.S. Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973); *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972).

Petitioner also avers that the decision below conflicts with this Court's decisions in *Leary* v. *United States*, 395 U.S. 6 (1969); *Turner* v. *United States*, 396 U.S. 398, reh. den., 397 U.S. 958 (1970); *Tot* v. *United States*, 319 U.S. 463 (1943); *United States* v. *Romano*, 382 U.S. 136 (1965); *Carrington* v. *Rash*, 380 U.S. 89 (1965).

We respectfully consider that the decision in the instant case is not in conflict with any of the two groups

of cases cited by Petitioner because the case at bar is completely different from them.

First of all, both groups of cases to which Petitioner refers, supra, deal with statutory dispositions creating irrebutable and rebutable presumptions. On the other hand, in the case at bar the Supreme Court of Puerto Rico was faced with the problem that there is not in Puerto Rico a legislative authorization for the refunding of taxes in cases of theft of taxable articles when the internal revenue stamps have been affixed to them as evidence of the payment of the taxes required. Consequently, that Court had to balance the equities or consider as a background, how this problem has been handled in the continental United States, in view of the similarity with regard to that matter between Puerto Rican tax legislation and that of the United States prior to 1954. It found that in 1954 the Code of Internal Revenue of the United States was amended to expressly prohibit the refund of taxes in cases of theft.[3] See Petitioner Appendix, pp. A-2 through A-3. After an extensive analysis of the Federal legislation, the rule of the federal courts on that matter, and the scope of its decision in *Ligget & Myers Tobacco Co. Inc.* v. *Buscaglia*,[4] the Supreme Court of Puerto Rico found that the Secretary of the Treasury of the Commonwealth of Puerto Rico lacks the power to refund the complete face value of the stolen stamps which were affixed to the stolen cigarettes, because the possibility of their introduction to Puerto Rico could not be eliminated. In other words, since the internal revenue stamps of the Commonwealth of Puerto Rico were affixed to the packages of cigarettes as evidence of pay-

[3] 26 U.S.C. 5705 (a).

[4] 64 P.R.R. 75 (1944).

ment of the tax, those cigarettes could be introduced, used and sold in Puerto Rico by any person at any time with no problem.[5] Contrary to the contention of Petitioner in the sense that the ruling of the case at bar creates an irrebutable presumptions, our position is that it does not create any irrebutable or rebutable presumption.

In the case at bar, Petitioner could have informed the Secretary of the Treasury of the Commonwealth of Puerto Rico, its officials in the City of New York, the Customs Service in Puerto Rico or the Police Department of Puerto Rico immediately after the occurrence of the theft. At that time many things could have been made to eliminate the possibility that the stolen cigarettes with the internal revenue stamps affixed to them were introduced in Puerto Rico. For example, as Petitioner and the New York office of the Department of the Treasury had the serial number of the internal revenue stamps, that serial number could have been given immediately to the internal revenue and customs service officials assigned to the airports and ports stations in Puerto Rico. In that way the cigarettes with the stamps could have been detected and confiscated when an attempt was made to introduce them into Puerto Rico. But Petitioner didn't do that. On the contrary, it was not until almost a year has elapsed from the date of the theft that it informed the Secretary of the Treasury of that theft. When petitioner requested the reissuance of the internal revenue stamps in controversy or the reimbursement of their face value it was too late for any preventive action by the Secretary of the Treasury.

[5] For an explanation of the internal revenue stamps characteristics see Respondent Appendix, pp. 5 through 10.

The decision in the instance case does not require a taxpayer, in Petitioner's position to prove that merchandise stolen in New York, with the Commonwealth of Puerto Rico internal revenue stamps affixed to it as evidence of the taxes, was not introduced to Puerto Rico. What is required to a taxpayer in that position is to be as diligent as possible so as to place the pertinent authorities in such a position as to eliminate or reduce the possibilities for the introduction into Puerto Rico of that merchandise.

The decision below not only does not require a taxpayer the kind of proof above mentioned, but it is also a liberal interpretation, favorable to Petitioner, of the Commonwealth of Puerto Rico Excise Tax dispositions, since it ordered the reimbursement of the face value of the internal revenue stamps affixed to the cigarettes destroyed by the Police Department of New York City, even when it was not made under the supervision of any representative of the Secretary of the Treasury of the Commonwealth of Puerto Rico. Section 27 (d) of that Act [6] provided as follows at the times relevant in this case.

> "(d) *Reissuance of Stamps in Certain Circumstances.* Cigarettes which, after having been withdrawn from the factories, or from piers, airports or other terminals, are taken away from the market as being unsuitable for normal consumptions, *may be destroyed under the supervision of the Secretary,* who shall be authorized to reissue new stamps to the introducer or manufacturer who originally paid the taxes, provided he claims same within a year from the date of the payment." (Emphasis added)

[6] 13 L.P.R.A. 4027 (d).

Apparently the Supreme Court of the Commonwealth of Puerto Rico considered the destruction of the cigarettes under the supervision of the Police Department of New York City as equally satisfactory, following the standards for cases of losses in major disasters. See 26 U.S.C.A. 5708(d); and 13 L.P.R.A. 1929 (e).

Otherwise, even assuming, *arguendo*, that by the decision in the instance case there is affected a petitioner's protected interest, an important public interest is also affected. That public interest is that there should not be a reissuance of internal revenue stamps or reimbursement of the face value of those stamps unless there is substantial proof of their destruction. As it has been pointed by the Court, the due process standards applicable to a particular protected interest depend upon the interest affected and the circumstances of the alleged deprivation. *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 6 L. ed. 2d. 1213 (1961). If the case at bar is examined in light of the aforementioned rule, the equities have to be balanced. Who should suffer the loss? Should it be the Petitioner, who incurred in negligence or laches when it delayed for ten months the notice to the pertinent authorities of the theft of the merchandise that was under its responsibility, or the Commonwealth of Puerto Rico, that was not given the opportunity by petitioner to eliminate or minimize the possibility of the importation into Puerto Rico of the stolen merchandise with the internal revenue stamps? Obviously, equities should be balanced in favor of the Commonwealth of Puerto Rico.

The Decision Below Does Not Give Extra-Territorial Effect to the Laws of Puerto Rico

Petitioner claims that the decision below gives extra-territorial effect to the tax laws of Puerto Rico.

As it was pointed by the Honorable Justice Douglas in *McLeod* v. *Dilworth Co.*, 322 U.S. 327, 335 (1944): "If there is a taxable event within the State of the buyer, I would make the result under the Commerce Clause *turn on practical considerations and business realities rather than on dialectics*". (Emphasis added) Aside that the Commerce Clause is not in force in the Commonwealth of Puerto Rico, our Supreme Court has also followed the aforementioned principle in *R.C.A.* v. *Govt. of the Capital*, 91 P.R.R. 404, 426 (1964) when it expressed as follows: "The controversies appertaining to the State's taxing power must be examined and decided on the basis of fundamentally practical considerations." The facts of the instance case were examined following those practical considerations and business realities, especially the continuous transit of people and the continuous traffic of merchandise between Puerto Rico and New York City.

The cases to which Petitioner refers [7] are inapplicable to the situation faced in the case at bar, since no stolen merchandise with internal revenue stamps already affixed to it as evidence of payment of the tax on cigarettes was in controversy in any of those cases. The principal question raised in those cases is whether or not a State can reach out-of-state normal business transactions. This Honorable Court has ruled on that regard that when a tax is imposed on an out-of-state transaction or taxpayer there should be a nexus between the taxing State and the taxpayer; and there should be some definite link, some minimum connection

[7] *American Oil Co.* v. *Neill*, 380 U.S. 451 (1965); *Miller Bros. Co.* v. *Maryland*, 347 U.S. 340 (1954); *Norton Co.* v. *Department of Revenue*, 340 U.S. 534 (1951); *McLeod* v. *J. E. Dilworth Co.*, 322 U.S. 327 (1944).

between a State and the person, property or transaction it seeks to tax.[8] This doctrine is inspired on the Congress purpose of avoiding the multiple taxing of interstate transactions,[9] since the very aim of the Commerce Clause was to create an area of free trade among the several states. Nonetheless this Honorable Court has expressed that "[i]t was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business."[10] This Court, since 1943 held, for example, that the State of Iowa could collect from a Minnesota corporation, with no office in Iowa, a use tax on the basis of property bought from that corporation and sent by it from Minnesota to purchasers in Iowa for use in Iowa. Iowa Code ruled on its § 6943.112 that the use tax constituted a debt owed by the retailer (in that case the Minnesota corporation) to Iowa. And more recently in *General Motors Corp.* v. *Washington*, 377 U.S. 436 (1964) this Court has approved a tax imposed by a nondomiciliary State to a nondomiciliary corporation, measured by its gross wholesale sales.

In the case at bar, there is a nexus between Petitioner and the Commonwealth of Puerto Rico since Petitioner makes business in the Commonwealth of Puerto Rico as "Phillip Morris de Puerto Rico" and receives all the benefits and protection of its laws and institutions. And the internal revenue stamps of the Common-

[8] 380 U.S. 458.

[9] *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347 U.S. 157 (1954).

[10] *Western Line Stock* v. *Bureau of Revenue*, 303 U.S. 250, 254 (1938).

wealth of Puerto Rico already affixed to the cigarettes packages as evidence of the payment of the tax on merchandise destined to Puerto Rico, is a definite link or a minimum connection between the Commonwealth of Puerto Rico and the transaction in controversy. See Respondent Appendix, pp. 5 through 10.

The Decision Below Does Not Conflict With the Federal Supremacy Clause of the Constitution of the United States, "The Compact" Between the Congress of the United States and the People of Puerto Rico or With Any Federal Law Applicable to the Commonwealth of Puerto Rico

The decision in the instance case does not retard, impede or burden any federal function, property or law. For that reason such decision is not in conflict with the Federal Supremacy Clause of the Constitution of the United States. In *United States* v. *Country of Fresno,* 429 U.S. 452 (1977), where this Honorable Court upheld a property tax imposed by the State of California to federal employees on their possessory interests in housing owned and supplied to them by the Federal Government as part of their compensation, there is a review of the interpretative evaluation by this Court of the Supremacy Clause of the Constitution of the United States. That decision demonstrates, as well as the decision in the instance case, that each situation or problem has to be examined and solved in light of the applicable law, the circumstances in which that law has to be enforced and the specific facts of the problem.

The instance case is not in conflict with any federal statute applicable to the Commonwealth of Puerto Rico or with the "Compact" between the Congress of the United States and the People of Puerto Rico.

It only represents a realistic application of the Excise Act of Puerto Rico, taking in consideration, as a background, how this problem has been handled in the United States. Supra pp. 10 through 14.

The Decision Below Does Not Affect the Taxation Power of the States of the United States

Petitioner finally argues that if the decision below is allowed to stand, it would encourage each State to attempt to tax any commodity destined for shipment to that State irrespective of whether the commodity was in fact ever introduced into the commerce of that state. This is a mere conjecture that we deem it is not necessary even to comment, since a constitutional question, as well as a request for damages should not be based on speculations and conjectures.[11] Nevertheless, contrary to the States of the United States, where the internal revenue laws of the United States are applicable, and where their taxing power is limited by the Commerce Clause, in the Comonwealth of Puerto Rico there is not in force any of those laws.[12]

As it has been pointed by the Supreme Court of Puerto Rico in *R.C.A.* v. *Govt. of the Capital,* supra:

> "Naturally, in the past, as at present, there has been interstate commerce relation between Puerto Rico and the United States, but that relation existed by express provisions of Congress in the exercise of its authority under subd. 2, § 3, Art. IV of the Federal Constitution and at present under Act No. 600. This interstate commerce relation has

[11] *Locklin* v. *Day-Glo Color Corp.,* 429 F 2d 873; cert. denied 400 U.S. 1020 (1971); *Bigelow* v. *RKO Radio Pictures,* 327 U.S. 251 (1946).

[12] *R.C.A.* v. *Govt. of the Capital,* 91 P.R.R. 404, 418 (1964).

constitutionally had, and still has, contours which are different from the relation which under the Constitution prevails among the States of the Union. That is why even under the former systems Puerto Rico was able to exercise the taxing power, and the Commonwealth may exercise that power at present respecting interstate commerce in a manner that perhaps it would not be permissible to a state covered by the provisions of the Federal Constitution." 91 P.R.R. 419 (Citations omitted)

CONCLUSION

Inasmuch as there is not involved any federal question on this case and, since the determination of the Supreme Court of Puerto Rico is not inescapably wrong or patently erroneous, the writ of certiorari should be denied.

Respectfully submitted.

In San Juan, Puerto Rico, this 12 day of October, 1977.

HECTOR A. COLON CRUZ
Solicitor General

ROBERTO ARMSTRONG, JR.
Deputy Solicitor General

REINA COLON DE RODRIGUEZ
Assistant Solicitor General
P. O. Box 192
San Juan, Puerto Rico 00902
Phone: 724-1991

APPENDIX

IN THE SUPREME COURT OF PUERTO RICO

REVIEW

PHILIP MORRIS, INC., *Plaintiff-appellee*

v.

SECRETARY OF THE TREASURY OF PUERTO RICO, *Defendant-appellant*

Petition for Review

TO THE HONORABLE COURT:

Comes now the Secretary of the Treasury represented by the Solicitor General of Puerto Rico and very respectfully states and prays:

JURISDICTIONAL GROUND

The jurisdiction here invoked is that conferred upon this Honorable Court by Section 14(b) of the Judiciary Act of the Commonwealth of Puerto Rico, 4 L.P.R.A. § 37(b), and by Rule 53.1 (b) of the Rules of Civil Procedures.

JUDGMENT WHOSE REVIEW IS SOUGHT

We hereby request review of the judgment rendered by the Superior Court, San Juan Part, on August 25, 1976 in *Philip Morris, Inc.* v. *Secretary of the Treasury,* Civil No. 75-1200. A copy of the notice of the judgment was entered in the record on September 3, 1976.

STATEMENT OF FACTS

On February 25, 1975, 19 days after receiving the Secretary of the Treasury's notice denying its petition for refund, plaintiff, Philip Morris, Inc., filed a complaint in the Superior Court, San Juan Part.[1] In said complaint plaintiff requested the trial court to order the Secretary of the

[1] Included as Exhibit I.

Treasury to refund the taxes paid on the cigarettes which it alleged had been stolen in the State of New York.

On March 25, 1975, the Secretary of the Treasury answered the complaint admitting that he had denied plaintiff's petition for refund and denying other allegations made in the complaint.[2]

On May 8, 1975 the Secretary of the Treasury submitted to plaintiff a "Requirement of Admissions of Facts and Interrogatories."

On May 16, 1975 plaintiff filed an Opposition to Requirement of Admissions of Facts and Interrogatory.

On May 23, 1975 the trial court issued on Order regarding the "Opposition to Requirement of Admissions of Facts and Interrogatory" relieving plaintiff from answering some interrogatories and ordering it to answer others.

On June 6, 1975 plaintiff filed a "Motion on the Taking of the Deposition of Plaintiff's Witness," Mr. David Hall, detective of the New York City Police Department to be taken in Puerto Rico. Later, on June 14, 1976 plaintiff filed a "Motion Requesting a Committee for the Taking of a Deposition in the United States."

On June 16, 1976 the trial court entered an order providing measures for the taking of Mr. David Hall's deposition.

On June 30, 1975 plaintiff filed an "Answer to Interrogatories."

On October 16, 1975 plaintiff filed a "Motion Filing the Original of the Deposition."

On March 24, 1976, the parties submitted the case to the consideration of the trial court through a stipulation of facts[3] filed on that same date, the deposition of detective

---

[2] Included as Exhibit II.

[3] Included as Exhibit III.

David Hall[4] and the memorandum of the parties, for the filing of which they requested a term of 30 days.

On April 1, 1976 the trial court accepted the parties' stipulation of facts.

On May 20, 1976 plaintiff filed its brief. It alleged, in synthesis, that since the taxable event had not taken place with regard to the stolen cigarettes it was proper to grant the refund requested or the reissuance of the internal revenue stamps.

On May 21, 1976, defendant, the Secretary of the Treasury, filed his brief, alleging, in short, that the taxable event in the case of cigarettes occurs when the stamps are purchased and not when they are introduced [in the island] and that the process of destructing the stamps in order to reissue new ones was not carried out according to the applicable provisions of law.

On June 2, 1976 defendant filed a "Memorandum for Reply" adding that it had not been established that the cigarettes and stamps in controversy had not been imported or introduced into Puerto Rico, and that the legal provisions concerning the reissuance of internal revenue stamps or the refund of their value should be restrictively construed due to the transferable nature of the said stamps.

No oral evidence was presented.

Finally, on August 25, 1976 the trial court rendered judgment[5] sustaining the complaint filed by Philip Morris, Inc. and ordered defendant to refund plaintiff the sum of $98,280.00 plus interest.

Feeling aggrieved with the judgment rendered, we appeal before this Honorable Court by way of a petition for review and assign the following errors:

---

[4] Included as Exhibit IV.

[5] Included as Exhibit V.

First Error

The trial court erred when it determined that the cigarettes and the internal revenue stamps of the Commonwealth of Puerto Rico affixed to them did not leave the New York City metropolitan area and that they had not reached Puerto Rico nor were introduced into the island.

Second Error

The trial court erred upon concluding that Article 27 (d) of the Excise Act of Puerto Rico (13 L.P.R.A. § 4027(d)) is applicable only after the cigarettes are introduced into Puerto Rico.

Third Error

Since we are dealing with an alleged loss and with the recovery thereof, the trial court erred upon not taking into consideration whether plaintiff-appellee had been totally or partly indemnified by the insurance company which covered the loss allegedly sustained.

ARGUMENTS OF THE ERRORS ASSIGNED

First Error

Our first contention is that the trial court erred when it concluded that the cigarettes and the Puerto Rico internal revenue stamps affixed to them and allegedly stolen in New York City did not leave said city's metropolitan area nor were they introduced into Puerto Rico.

In arguing this error, we wish, first of all, to direct the attention of this Honorable Court to the following fact: That once acquired from the Treasury Department, the internal revenue stamps which had to be affixed to the cigarette packs and cartons at the time of the events here in

controversy,[6] are similar in nature to a negotiable instrument. That is to say, that after said stamps were purchased from the representative of the Secretary of the Treasury of the Commonwealth of Puerto Rico in New York, the supervision of the Department of the Treasury with regard to said stamps and their use ceased there, since there was no way of requiring, verifying, or proving that said stamps would be in effect affixed to a pack of a determined brand of cigarettes or that it would be done by a specific manufacturer. In other words, due to its nature and configuration the stamp could be transferred or used by a person or entity other than the one who acquired it. The only supervision exercised by the Secretary of the Treasury after said stamps were sold was limited to verify whether or not the packs or cartons of cigarettes introduced into, sold, or used in Puerto Rico had the internal revenue stamp affixed evincing the payment of the tax, but he had no manner of distinguishing some stamps from others. That is to say, that when the cigarettes bearing the Puerto Rico internal revenue stamps were introduced into the island it was impossible to verify whether or not the person who introduced, sold, or used them was the same one who paid the tax; payment which was already evinced by the stamp affixed. That situation facilitated the introduction of cigarettes as those of the instant case without any problem whatsoever.

Going into the specific facts of the present case, we have that plaintiff-appellee alleged that a total of seven million five hundred sixty thousand (7,560,000) cigarettes[7] were

[6] Act No. 8 approved October 17, 1975 amended the Excise Act of Puerto Rico in order to eliminate the use of internal revenue stamps for the payment of taxes on cigarettes. From the date of effectiveness of said Act the system to levy and collect taxes on cigarettes is similar to that established by the Tax Act for other taxable articles.

[7] These cigarettes requires about 459,000 internal revenue stamps. The stamps for the 20-cigarette-packs were worth 26 cents and those for the 10-cigarette-packs were worth 13 cents.

stolen, of which 5,940,000 were packed in twenty-cigarette-packs and 1,620,000 in ten-cigarette-packs, all bearing the corresponding internal revenue stamps.

From the total of 7,560,000 cigarettes, 1,716 packs were recovered. From detective David Hall's deposition, at page 22, lines 2 to 5, it comes forth that most of the packs recovered in the city of New York were ten-cigarette-packs. So assuming that half of the packs recovered were those containing ten cigarettes, this would amount to a total of only 25,740 cigarettes. The other cigarettes, that is, approximately seven million five hundred thirty four thousand two hundred sixty (7,543,260) [sic] were not found in New York City nor in any other city of New York State or in any other state of the United States.

Based on the stipulated facts, the memorandum of the parties and the deposition of detective Hall, the trial court determined that: "The cigarettes which plaintiff owned and which were stolen, were lost in the city of New York, did not leave the metropolitan area of said city and did not reach nor were introduced into Puerto Rico." (See finding of fact No. 22 and conclusion of law No. 9 of the judgment appealed from.)

Considering the foregoing conclusion, the trial court proceeded to apply to the facts of this case the decision in *Ligget & Myers Tobacco Co., Inc.* v. *Buscaglia.*[8]

But the facts in *Ligget & Myers Tobacco Co., Inc.* v. *Buscaglia,* supra, are different from those of this case, since in the former no other conclusion could be reached but that the cigarettes in question could not reach Puerto Rico, since the steamer which brought them was sunk in the ocean. It was absolutely impossible to introduce, sell or use the cigarettes in Puerto Rico.

---

[8] 64 P.R.R. 75 (1944).

In the present case the cigarettes were stolen, and from a total of 7,560,000 cigarettes packed and bearing the stamps only 1,716 were recovered and destroyed by the New York police, but there was no representative of the Secretary of the Treasury present at said act as required by the applicable law. The difference, some 7,534,260 cigarettes, as we mentioned before, were not found in New York City nor in any other area of New York State or in any other State. That is, that in view of the fact that the packs bore the internal revenue stamps of the Commonwealth of Puerto Rico; that they did not bear a New York State tax stamp, that those who stole the cigarettes were being persecuted by the police in New York City, since it was there where they stole the van; and that they could introduce them into Puerto Rico with less problems than those they would have selling them in another state and with a substantially greater profit, there are great probabilities that said cigarettes were introduced into Puerto Rico.

And as the trial court stated at page 18 of the judgment: "The party who has the burden of persuasion must induce the judge to believe that the existence of the facts he asserts is more probable than the nonexistence of the same."

We understand that the probability that said cigarettes were introduced into Puerto Rico is greater than the probability that they did not leave New York or that they were not introduced into Puerto Rico, particularly when detective Hall himself indicated in his testimony that the packs recovered in New York City were mainly those containing ten cigarettes. The small amount of cigarettes recovered in New York, as compared with the total amount stolen, is another indication that almost all the cigarettes were taken outside New York and that the most tempting place to introduce them was Puerto Rico, because they already bore the internal revenue stamps, making their introduction easier and because it was the place where their sale would yield the greatest financial benefits.

We know that a litigant may prove his case through indirect evidence.[9] But this Honorable Court has held that "the circumstances shown by the evidence *should be sufficiently strong that the trial court might properly, on the grounds of probability existing in the case, exclude inferences favorable to the defendant.*" [10] (Emphasis supplied.)

Therefore, we consider that the logical inference derived from the proven facts to which we have already referred, is that the cigarettes bearing the Commonwealth of Puerto Rico internal revenue stamps were or could have been introduced into Puerto Rico. That inference is more probable than the inference that they did not leave the New York City metropolitan area and that they were not introduced into Puerto Rico.

Besides, since this is a case involving a loss of property by theft, we must point out that the tendency in other jurisdictions,[11] is that of not allowing refund in cases of theft or robbery. For that reason, the trial court should have construed restrictively the right to refund requested by plaintiff-appellee.

---

[9] *Murcelo* v. *H. I. Hettinger & Co.*, 92 P.R.R. 398 (1965); *Rodríguez* v. *Ponce Cement Corp.*, 98 P.R.R. 196 (1969).

[10] *Widow of Delgado* v. *Boston Ins. Co.*, 99 P.R.R. 693, 702 (1971).

[11] In the federal jurisdiction, the law governing this matter provides as follows:

> "(a) Credit or refund.—Credit or refund of any tax imposed by this chapter or section 7652 shall be allowed or made (without interest) to the manufacturer, importer, or export warehouse proprietor, on proof satisfactory to the Secretary or his delegate that the claimant manufacturer, importer, or export warehouse proprietor has paid the tax on tobacco products and cigarette papers and tubes withdrawn by him from the market; or on such articles lost (otherwise than by theft) or destroyed, by fire, casualty, or act of God, while in the possession or ownership of the claimant". (26 U.S.C.A. 5705).

And even if the issue in controversy was liberally interpreted in favor of plaintiff-appellee, if any refund lies it would be with regard to the stamps affixed to the cigarette packs allegedly destroyed by the New York police, since those are the only ones of which there is a reasonable certainty that were not introduced into Puerto Rico. But even with regard to those cigarettes and stamps, the proceeding established by the provisions in force at the time when they were allegedly destroyed were not followed,[12] since an officer of the Department of the Treasury was not present to supervise their destruction. This leads us to argue the second error assigned.

Second Error

We maintain that the trial court erred upon concluding that Article 27(d) of the Excise Act of Puerto Rico (13 L.P.R.A. § 4027(d)) applies only after the cigarettes have already been introduced into Puerto Rico.

As of said date said article provided the following:

> "(d) *Reissuance of Stamps in Certain Circumstances.* Cigarettes which, after having been withdrawn from the factories, or from piers, airports or other terminals, are taken away from the market as being unsuitable for normal consumption, *may be destroyed under the supervision of the Secretary, who shall be authorized to reissue new stamps to the introducer or manufacturer who originally paid the taxes*, provided he claims same within a year from the date of the payment".[13] (Underscore supplied.)

---

[12] The exact date on which they were destroyed does not appear from the evidence. Mention is made to: after 90 days. (See finding of fact No. 18 of the judgment appealed from.) We assume that it was at the end of 1970.

[13] 13 L.P.R.A. § 4027(d).

The purpose of the aforecited provision is that before the Secretary of the Treasury reissues new stamps he must be absolutely sure that the internal revenue stamps affixed to the cigarettes found unsuitable for normal consumption are actually destroyed. Therefore, the lawmaker provided measures in order that said destruction be made under the supervision of the Secretary of the Treasury before new stamps are reissued to substitute those destroyed. As we can see, the lawmaker does not establish the limitation fixed by the trial court. It is an acknowledged rule that where the lawmaker does not impose limitation, the courts should not do so either. And much less when the legal provision involved is one vested with a high public interest and inspired in the legislative intent to guarantee to the government that it would not reissue some internal revenue stamps of whose destruction it has not ascertained, or in other words, that it would refund a tax without ascertaining that the taxpayer is entitled to it.

In the instant case the cigarettes had left the factory with the stamps already affixed, stamps which Phillip Morris Co. Inc. had purchased from the representative of the Secretary of the Treasury in New York. Consequently, when the cigarettes allegedly destroyed in New York were withdrawn from the market, the proceeding established in the aforecited act had to be followed in order for plaintiff-appellee to be entitled to the reissuance of new stamps.

This case is also different in this respect from *Liggett & Myers Tobacco Co. Inc., supra,* since in the latter there were no cigarettes or stamps to destroy since they had sunk in the ocean, and in this case there were cigarettes to be destroyed, but the proceeding established by law was not followed.

Since the alleged destruction of the cigarettes and stamps was carried out in New York City, it would have been very easy for a representative of the Secretary of the Treasury in the New York Office, to supervise the destruction of the

same, if it had been requested. But nobody was summoned to supervise the destruction, and it was not until nearly a year after the alleged theft, on May 4, 1971, that the Secretary of the Treasury learned of the incidents of the case when plaintiff-appellee filed a petition for refund before the Department of the Treasury, as it appears from the complaint.

Third Error

We maintain that the trial court erred upon not taking into consideration, before deciding whether or not the refund of the taxes paid was proper, if plaintiff-appellee had been totally or partly indemnified by the insurance company which covers the loss allegedly sustained. By failing to do so, and by ordering the refund, the trial court was propitiating a double indemnity for plaintiff-appelle, that is, that plaintiff would be twice indemnified for an economic loss, thing which was severely censured by this Honorable Court in the decision of *Futurama Import Corp. and Isaac Menda* v. *Trans Caribbean Airways.*[14]

An argument against this assignment of error could be that said question was not raised before the trial court. But we all know, since it is a well-known fact that companies engaged in large-scale business, as plaintiff-appellee Philip Morris Co., Inc., have insurance policies to cover the risks they may face in their different business transactions, particularly when such valuable cargoes as those of cigarettes bearing internal revenue stamps are involved. It is also a well-known fact that van transportation companies, as the one involved in this case, Transamerican Trailer Transport (TTT), have insurance covering this type of risks.

Since the foregoing is a widely known fact the trial court could have taken judicial notice of the fact that plaintiff-

---

[14] Per Curiam opinion of January 30, 1976, Adv. Sheet Bar Asso. 1976-16.

appellee, Philip Morris Co. Inc., had insured the cigarette shipment against risk of loss.

This Honorable Court has repeatedly held that "Without need of evidence to that effect, courts shall take judicital notice of facts which are matters of common knowledge, notorious and unquestionable." [15] And many years ago it stated that "[t]he loose language of our local Law of Evidence should not be strictly construed. It merely indicates the general lines along which the power of judicial notice may be exercised. It does not limit the range or the scope of that power which is inherent in every court of justice, but points the way to a wide field of usefulness wherein that power may be utilized at will as an effective aid to the simplification of procedure and to the practical administration of substantial justice." [16]

If the trial court had taken judicial notice of the fact that plaintiff-appellee had insured the loss allegedly sustained, this would not preclude the parties from raising the contentions they wished to present. For, citing Wigmore,[17] this Honorable Court has pointed out that "a matter judicially noticed merely means that it is taken as true without the offering of evidence by the party who ordinarily should have done so; that this is so because the court assumes that the matter is so notorious that it will not be disputed; *but that the opponent is not barred from contradicting the matter by evidence, if he believes it disputable.*" [18] (Underscore supplied.)

Since the controversy centers on an alleged loss and the recovery thereof, the trial court should have taken judicial

---

[15] *Lluberas* v. *Mario Mercado e Hijos*, 75 P.R.R. 7 (1953); *Widow of Delgado* v. *Boston Insurance Co.*, 99 P.R.R. 693 (1971).

[16] *Silva* v. *Carbonell*, 35 P.R.R. 224, 232 (1926).

[17] IX [Wigmore], 3d ed. at 535, § 2567.

[18] *Lluberas* v. *Mario Mercado e Hijos, Ibid.*

notice that there was an insurance company covering said risk, it should have informed the parties that it had taken judicial notice of said fact and it should have given them the opportunity to rebut or accept it. It was proper to take judicial notice of said fact, since as one of the members of this Honorable Court very well stated "when there are insurances, the loss should fall on the insurer and stop there, since the insurance companies are those which are precisely in the business of insuring risks and are the distributors of risks par excellence." [19]

Since this case involves such an important public interest as is the collection and refund of taxes, which affects the general interest of the society in which we live, and which is consequently vested with a high public interest, there is no reason to justify the trial court's failure to take judicial notice of the aforestated fact. By failing to do so, the court was propitiating a double compensation for plaintiff-appellee which "is really an irrational rule. To collect a debt more than once contradicts the good sense of justice, and at the social level, it results in an additional cost for the society which pays it." [20]

In short, the juudgment rendered by the trial court is inclined to injustice, first, because plaintiff-appellee may receive a double compensation for the same loss and also because the people of Puerto Rico would have to refund some taxes on a merchandise which logically must have been introduced, sold, and used in Puerto Rico.

WHEREFORE, the Solicitor General very respectfully requests that the writ requested be issued and that following the corresponding legal proceedings the judgment rendered in this case against the Secretary of the Treasury be reversed.

---

[19] *Futurama Import Corp. and Isaac Menda* v. *Trans Caribbean Airways, Ibid.* Concurring opinion of Mr. Justice Rigau.

[20] *Ibid.*

San Juan, Puerto Rico, this 4th day of October 1976.

/s/ Roberto Armstrong, Jr.
Roberto Armstrong, Jr.
Acting Solicitor General

/s/ Reina Colón de Rodriguez
Reina Colón de Rodriguez
Assistant Solicitor General

Notice

I Certify: That today I have served by mail a copy of the foregoing Petition to Goldman, Antonetti, Barreto, Curbelo & Dávila, to their address, Post Office Box 13486, Santurce, Puerto Rico 00908.

San Juan, Puerto Rico, this 4th day of October 1976.

/s/ Reina Colón de Rodriguez
Reina Colón de Rodriguez
Assistant Solicitor General
Department of Justice
Box 192
San Juan, Puerto Rico 00902
Tel. 724-1991

Chief Clerk's Certificate

I, Ernesto L. Chiesa, Chief Clerk of the Supreme Court of Puerto Rico, Do Hereby Certify:

That the foregoing is a true and faithful translation from Spanish into English of the Petition for Review of October 4, 1976 which is part of the record in case No. R-76-338, *Philip Morris, Inc.* v. *Secretary of the Treasury of Puerto Rico.*

In Witness Whereof and at the request of the Office of the Solicitor General of Puerto Rico, I issue these presents for official use, free of charge, under my hand and the seal of this Court in San Juan, Puerto Rico, this 22th day of September 1977.

/s/ Ernesto L. Chiesa
Chief Clerk
Supreme Court of Puerto Rico

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-227

PHILIP MORRIS, INC.,

Petitioner,

v.

SECRETARY OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

PETITIONER'S REPLY BRIEF

SALVADOR ANTONETTI ZEQUEIRA,
BASIL J. DAVILA,
GOLDMAN, ANTONETTI & DAVILA,
P. O. Box 13486,
Santurce, Puerto Rico 00908.

JAMES W. SHEA,
TIMOTHY C. QUINN, JR.,
CONBOY, HEWITT, O'BRIEN & BOARDMAN,
20 Exchange Place,
New York, New York 10005,

Counsel for Petitioner.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-227

PHILIP MORRIS, INC.,

Petitioner,

v.

SECRETARY OF THE TREASURY OF THE COMMONWEALTH OF PUERTO RICO,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF PUERTO RICO

PETITIONER'S REPLY BRIEF

Petitioner, Philip Morris Incorporated, replies to arguments raised for the first time in Respondent's Brief in Opposition as follows:

Petitioner's Claim Was Timely Filed

1. Respondent argues that Petitioner was late in giving notice of the theft. The courts below considered the case on the merits and granted Petitioner the relief requested except that the Supreme Court of Puerto Rico granted only partial relief. Petitioner had no duty to give notice to Respondent prior to filing its claim. Moreover, the applicable Statute of Limitations for filing claims for refund is four years after payment. 13 L.P.R.A. §261.

The Federal Questions Were Timely Raised

2. Respondent argues that the Federal questions were not timely raised below. The Trial Court adequately considered the questions of the extraterritorial application of the tax and the prerequisite nexus between the merchandise subject to tax and the taxing power of the Commonwealth, as evidenced by its First Conclusion of Law. Pages A-12 and A-13 of the Appendix to Petition. No occasion for argument of the irrebuttable presumption and other due process issues existed prior to the decision of the Supreme Court of Puerto Rico, which decision for the first time overturned established local legal precedents on which the Petitioner had reasonably relied. *Great Northern Railway Co.* v. *Sunburst Oil & Refining Co.*, 287 U.S. 358 at 366 and 67 (1932); *Brinkerhoff-Faris Trust & Savings Company* v. *Hill*, 281 U.S. 673 at 677 and 78 (1929).

CONCLUSION

For these reasons, and the reasons set forth in the Petition herein, the decision below should be reviewed and summarily reversed.

Respectfully submitted,

SALVADOR ANTONETTI ZEQUEIRA,
BASIL J. DAVILA,
GOLDMAN, ANTONETTI & DAVILA,
P. O. Box 13486,
Santurce, Puerto Rico 00908.

JAMES W. SHEA,
TIMOTHY C. QUINN, JR.,
CONBOY, HEWITT, O'BRIEN & BOARDMAN,
20 Exchange Place,
New York, New York 10005,

Counsel for Petitioner.